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# The Minnesota Environmental Rights Act

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## Note: The Minnesota Environmental Rights Act

### I. INTRODUCTION

The principal function of courts in environmental matters is to restrain projects that have not been adequately planned and to insist that they not go forward unless and until those who wish to promote them can demonstrate that they have considered and adequately resolved, reasonable doubts about their consequences.

Joseph L. Sax<sup>1</sup>

On June 7, 1971, the Minnesota Environmental Rights Act<sup>2</sup> was signed into law by Governor Wendell Anderson, culminating over nine months of meetings, drafting and lobbying by its proponents. The primary purpose of the Act is "to provide an adequate civil remedy to protect air, water, land and other natural resources located within the state from pollution, impairment, or destruction."<sup>3</sup>

Previously, Minnesota citizens were unable to effectively protect the environment through judicial action. A private nuisance action, the only such action available, could be maintained "by any person whose property is injuriously affected or whose personal enjoyment is lessened by the nuisance."<sup>4</sup> However, if the conduct at issue injured or endangered the rights "of any considerable number of members of the public,"<sup>5</sup> then, before recovery could be had by a private individual, it had to be shown that he "suffered an injury special or peculiar to himself which is not common to the general public."<sup>6</sup> The

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1. J. SAX, *DEFENDING THE ENVIRONMENT*, 113 (1970). See also Comment, *The Role of the Judiciary in the Confrontation with the Problems of Environmental Quality*, 17 U.C.L.A. L. REV. 1070 (1970).

2. Minn. Laws 1971, ch. 952, coded therein as §§ 116B.01-.14 [hereinafter cited as MINN. STAT. §§ 116B.01-.14 (1971)]. The full text of the Act is set forth in the Appendix to this note.

3. MINN. STAT. § 116B.01 (1971). The Rights Act contains no mention of protection of the "public trust," a concept which is part of the Michigan Environmental Protection Act. MICH. COMP. LAWS ANN. § 691.1202(1) (1971). However, the language used in Section 116B.01 of the Rights Act, as well as in other sections, probably captures all that is embodied in the concept of the public trust doctrine. The leading article on the trust doctrine is Sax, *The Public Trust in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 478 (1970).

4. MINN. STAT. § 561.01 (1969). See generally Porter, *The Role of Private Nuisance Law in the Control of Air Pollution*, 10 ARIZ. L. REV. 107 (1968); Prosser, *Private Action for Public Nuisance*, 52 VA. L. REV. 997 (1966).

5. MINN. STAT. § 609.74(1) (1969).

6. *Hill v. Stokely-VanCamp Inc.*, 260 Minn. 315, 321, 109 N.W.2d 749, 753 (1961); accord, *Robinson v. Westman*, 224 Minn. 105, 29

Environmental Rights Act (hereinafter referred to as "the Rights Act" or "the Act") extends the ability of private individuals and groups to maintain an action to protect the environment by giving standing to:

[a]ny person residing within the state; the attorney general; any political subdivision of the state; any instrumentality or agency of the state or of a political subdivision thereof; or any partnership, corporation, association, organization, or other entity having shareholders, members, partners or employees residing within the state . . . .<sup>7</sup>

The Act authorizes four types of actions through which the environment can be protected: (1) actions to enforce existing environmental quality standards,<sup>8</sup> (2) actions to enjoin conduct which materially adversely affects the environment,<sup>9</sup> (3) actions involving intervention into administrative proceedings or judicial review thereof where the conduct at issue is alleged to have caused pollution,<sup>10</sup> and (4) actions challenging the adequacy of state environmental quality standards or regulations.<sup>11</sup> In each case, the plaintiff must initially make out a *prima facie* showing that his contention has merit. Then, in most cases, the court must remit to the appropriate agency, if any, while still retaining jurisdiction over the case. If the court finally concludes that the plaintiff has discharged his burden of proof and that the defendant has not satisfactorily established a defense under the Act, it has several options. It may grant

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N.W.2d 1 (1947); *Lead v. Inch*, 116 Minn. 467, 134 N.W. 218 (1912); *Viebahn v. Board of Cty. Comm'rs*, 96 Minn. 276, 104 N.W. 1089 (1905). See also Jaffe, *Standing to Secure Judicial Review: Public Actions*, 74 HARV. L. REV. 1265 (1961).

7. MINN. STAT. § 116B.03(1) (1971). With one minor exception, Sections 116B.09(1) and 116B.10(1) also contain this standing provision. The only difference is that, while Section 116B.03(1) begins with "any person," those two sections begin with "any natural person." This difference is completely irrelevant, however, because the definition of "person" contained in Section 116B.02(2) includes "any natural person."

The issue of standing to sue in environmental cases, an issue which the Rights Act appears to solve, has been the topic of numerous articles. See Jaffe, *Standing to Sue in Conservation Suits*, in *LAW AND THE ENVIRONMENT* 123 (M. Baldwin & J. Page, Jr. eds. 1970); Porter, *supra* note 4; Prosser, *supra* note 4; Rogers, *The Need for Meaningful Control in the Management of Federally Owned Timberlands*, 4 LAND & WATER L. REV. 121 (1969); Note, *Standing on the Side of the Environment: A Statutory Prescription for Citizen Participation*, 1 ECOLOGY L.Q. 561 (1971); Comment, *Environmental Law—Standing to Sue*, 6 LAND & WATER L. REV. 527 (1971).

8. See MINN. STAT. §§ 116B.02(5), 116B.03(1) (1971).

9. *Id.*

10. *Id.* at § 116B.09(1).

11. *Id.* at § 116B.10(1).

declaratory relief, temporary and permanent equitable relief, or may impose such conditions upon a party as are necessary or appropriate to protect the air, water, land or other natural resources located within the state from pollution, impairment, or destruction.<sup>12</sup>

Before further examining the operative provisions of the Rights Act, this note will recount its legislative history.

## II. LEGISLATIVE HISTORY

The original bill in Minnesota authorizing citizen suits to protect the environment was introduced in the 1969 legislative session by Governor Wendell Anderson,<sup>13</sup> then a state senator. It was very similar to the Model Act drafted by Professor Joseph L. Sax.<sup>14</sup> It is difficult to assess the impact of the Anderson bill on events during the 1971 legislative session leading up to the passage of the Environmental Rights Act. The bill was introduced too late in the 1969 legislative session to be considered. In fact, very few legislators were informed about the concept of such legislation at that time. In addition, although the Governor made pollution and environmental protection part of his 1970 gubernatorial campaign, he did not actively support the citizen's suit bills during the 1971 legislative session.

The Act as passed had its real beginning in an Environmental Law Committee of the Minnesota Bar Association. In October 1970, a subcommittee<sup>15</sup> was formed to draft a bill along the lines of Sax's Model Act and a similar act which had been recently passed in Michigan.<sup>16</sup>

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12. *Id.* at § 116B.07.

13. The Anderson bill was drafted by Grant Merritt, currently the Executive Director of the Minnesota Pollution Control Agency.

14. Professor Sax is a professor of law at the University of Michigan. The Model Act he drafted is entitled the Natural Resource Conservation and Environmental Protection Act of 1969. It was drafted at the request of the West Michigan Environmental Action Council. The complete text of this Act can be found in the appendix to J. SAX, *supra* note 1, at 247-52.

15. The chairman of the subcommittee, Richard N. Flint, was an active member of the Sierra Club in Minnesota. Other key members included John M. Broeker, chairman of the North Star Chapter of the Sierra Club, Charles K. Dayton, a member of the Sierra Club and currently the Director of the Minnesota Public Interest Research Group (MPIRG), and Will H. Hartfeldt, also a Sierra Club member and a former Deputy Attorney General for the Minnesota Department of Natural Resources.

16. MICH. COMP. LAWS ANN. §§ 691.1201-1207 (1971). Known as the Thomas J. Anderson, Gordon Rockwell Environmental Protection Act of 1970, the Act was signed on July 27, 1970. For a discussion of

The subcommittee members agreed that there were four major controversies during the course of over a dozen drafting meetings.<sup>17</sup> The first was whether both equitable relief and compensatory damages would be available to successful plaintiffs. It was concluded that the Act would not provide damages as a form of relief. The consensus was that it would have made the bill appear too strong to have a realistic chance of being passed. There were also fears that, if damages were available, the courts would be less likely to "protect"<sup>18</sup> the environment by eliminating pollution and more likely to order monetary compensation for environmental damage.<sup>19</sup> It was also thought that if damages were available opponents of the legislation would attack it as another vehicle for attorneys to obtain legal fees.<sup>20</sup>

The other areas of major disagreement involved legal fees and defenses. Some members of the subcommittee wanted the prevailing plaintiff to be awarded attorney fees and court costs. This was eventually rejected for two reasons. First, it was thought this would open the door to such awards for defendants if the plaintiff did not prevail.<sup>21</sup> This would have been a significant deterrent to many plaintiffs in all but the most clear-cut cases. Moreover, it would have left the legislation open to attack as a vehicle to produce legal fees even more than the inclusion of a damages provision.

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the legislative history of that Act, see 4 J.L. REFORM 358 (1970). Similar acts have since been passed in other states, including: Conn. Laws 1971, Pub. Act No. 96; Fla. Laws 1971, ch. 71-343; Ind. Laws 1971, ch. 35; Mass. Laws 1971, ch. 732. A similar bill was introduced in Congress in 1970 by Senators Hart and McGovern. It was known as the Environmental Protection Act of 1970, S. 3575, 91st Cong., 2d Sess. (1970). It was reintroduced by the same senators in 1971 as S. 1032, 92d Cong., 1st Sess. (1971). The companion bill was introduced in the House of Representatives in 1970 by Congressman Udall as H.R. 18429, 91st Cong., 2d Sess. (1970), and again in 1971 as H.R. 5074, 92d Cong., 1st Sess. (1971). This proposed legislation is discussed in Note, *Standing on the Side of the Environment: A Statutory Prescription for Citizen Participation*, 1 *ECOLOGICAL L.Q.* 561, 609-49 (1971).

17. Interview with Richard N. Flint, chairman of the Environmental Law Subcommittee of the Minnesota Bar Association, in Minneapolis, Minnesota, Aug. 30, 1971.

18. MINN. STAT. § 116B.01 (1971).

19. See note 171 *infra*.

20. Interview with Charles K. Dayton, member of the Environmental Law Subcommittee of the Minnesota Bar Association, in Minneapolis, Minnesota, Sept. 2, 1971.

21. Interview with John M. Broeker, member of the Environmental Law Subcommittee of the Minnesota Bar Association, in Minneapolis, Minnesota, Sept. 7, 1971.

There were two points of sharp disagreement over what should constitute a defense under the Act. The first was whether the defense of "no feasible and prudent alternative" should be included as part of an affirmative defense.<sup>22</sup> Such language is contained in both Sax's Model Act<sup>23</sup> and the Michigan Act,<sup>24</sup> but some members of the Subcommittee felt this would allow economic considerations to become a defense. The second point was closely connected to the first. It was thought by some that economic considerations should never be considered, while others felt they should always be a factor. The final draft included the "no feasible and prudent alternative" provision.<sup>25</sup> However, in the same section, a sentence was added stating that "[e]conomic considerations alone shall not constitute a defense hereunder."<sup>26</sup>

The final draft was submitted to the Bar Association Board of Governors in January 1971. After considerable debate and private discussion, the Board of Governors decided not to endorse the bill. In the meantime, the Subcommittee which had drafted the bill decided to find authors in the legislature and to work for the passage of the bill, regardless of what the Board of Governors decided.

During December 1970 and January 1971 another factor came into play. The Minnesota Environmental Control Citizens Association (MECCA), which had been in close contact with the drafting committee, decided that the Lawyers' bill, the new name for the Bar bill, was too weak. Using the Model Act and the Lawyers' bill as a foundation, MECCA drafted its own bill. There were several provisions in it which made it considerably more stringent than the Lawyers' bill. It generally made non-pollution the goal, eliminated the "no feasible and prudent alternative" provision and specified that economics could only be considered in fashioning a remedy. The MECCA bill made provision for per diem damages and also would have allowed

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22. This language is in the Rights Act. MINN. STAT. §§ 116B.04, 116B.09(2) (1971).

23. Natural Resource Conservation and Environmental Protection Act of 1969 §§ 3 and 6(a). See note 14 *supra*.

24. MICH. COMP. LAWS ANN. §§ 691.1203(1) and 691.1205(2) (1971).

25. Draft of Dec. 28, 1970 §§ 4 and 9(2), on file with the Minnesota Law Review.

26. *Id.* at § 4. The language which was added to § 9(2) was somewhat different: "Economic considerations alone shall not justify such conduct, program or product." This was amended to finally read "Economic considerations alone shall not justify such conduct."

the courts to specify new and stricter standards of environmental quality in certain situations.<sup>27</sup>

During January 1971, both groups found authors for their bills. The Lawyers' Committee decided on Reps. Rolf T. Nelson, John P. Wingard, Fred C. Norton, Jon O. Haaven and Howard R. Albertson in the House and Sens. W.G. Kirchner, Wayne G. Popham and Edward J. Gearty in the Senate. Their bill, designated House File (H.F.) 284 and Senate File (S.F.) 418, was introduced in the House on January 25, 1971 and soon after in the Senate. MECCA's bill, H.F. 715 and S.F. 471, was introduced in the House on February 8, 1971, and in the Senate two days later. The primary authors of the MECCA bill were Rep. Paul R. Petrafeso and Senator George R. Conzemius. The importance of the selection of primary authors became evident immediately in the House. Rep. Nelson, a respected member of the Conservative majority, was able to send H.F. 284 to the Judiciary Committee, chaired by Rep. Albertson, another author of H.F. 284. He in turn sent it to a special subcommittee chaired by Rep. Keefe, who was favorably disposed to this type of legislation. On the other hand, Rep. Petrafeso, a member of the Liberal minority, was unable to prevent H.F. 715 from being sent to Rep. Gustafson's Environmental Preservation Committee. Since Rep. Gustafson was one of the most severe critics of the concept of citizens' suits, H.F. 715 was essentially dead. However, the fact that the MECCA bill existed was of some benefit. The stringency of H.F. 715 made the Lawyers' bill appear very mild. Representative Nelson was able to use this to advantage. In a newspaper article he described his bill as being a middle course between the MECCA approach and the position of the Minnesota Association of Commerce and Industry (MACI), a major opponent of the bill.<sup>28</sup>

Although the Senate took no action on the bills until late March, the House subcommittee to which H.F. 284 had been sent began hearings in early February. Representative Keefe's subcommittee held seven meetings during February and March. From the start of these hearings, the proponents of H.F. 284 were well organized. They were careful to have supporters at the hearings and always were prepared for questions on the

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27. Differences between the MECCA bill and the Lawyers' bill were set out in a critique which was distributed by MECCA (private files of Howard Vogel, a legislative representative of MECCA, in Minneapolis, Minnesota).

28. Minneapolis Tribune, Mar. 14, 1971, § C, cols. 1 & 2, at 2.

operation of the bill. Various members of the bar committee which originally drafted the bill testified at these hearings, and most were Sierra Club members. Representatives of other groups also testified in favor of the general concept and H.F. 284 in particular.<sup>29</sup> These groups included the League of Women Voters,<sup>30</sup> the Izaak Walton League and the Citizens League.

Although opponents were slower to organize, they became increasingly active as the hearings progressed. Critics of the bill who testified at these hearings included representatives of the Minnesota Association of Commerce and Industry,<sup>31</sup> the Minnesota Timber Producers Association and the League of Minnesota Municipalities, as well as a number of individuals who worked for various industrial concerns but stated they were only expressing their personal views.

During these subcommittee hearings in the House, a number of important amendments were made to the bill. At the Feb. 25 meeting, Rep. Nelson introduced several amendments, all of which were adopted. The name of the bill was changed from the Minnesota Environmental Protection Act to the Minnesota Environmental Rights Act.<sup>32</sup> Another amendment protected persons from liability for conduct taken on their own

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29. Mr. John Badalich, then the Executive Director of the Minnesota Pollution Control Agency, testified in favor of the concept although he added the ambiguous statement that the bill should conform to and recognize his agency's procedures. A copy of Mr. Badalich's testimony and recommendations is contained in Official House Judiciary Subcommittee Report, H.F. 284.

Mr. Howard Vogel, representing MECCA, testified frequently. He was decidedly in favor of the concept embodied in H.F. 284 but was of the opinion that H.F. 715 was superior because it promised greater environmental protection. Interview with Howard J. Vogel, member of MECCA, in Minneapolis, Minnesota, Sept. 9, 1971.

30. The League of Women Voters was represented by Mrs. Rodney Loper. Her testimony is contained in a letter distributed to all committee members and is contained in the Official House Judiciary Subcommittee Report, H.F. 284.

31. That association, popularly known as MACI, prepared and distributed copies of its testimony and recommendations. Among other provisions in the bill, MACI was specifically critical of (1) allowing courts to set standards on a case-by-case basis because it would prevent long range planning, (2) not providing specific guidelines to determine what constitutes pollution, and (3) shifting the burden of proof from the plaintiff to the defendant upon a prima facie showing by the plaintiff. This critique is included in the Official House Judiciary Subcommittee Report, H.F. 284, Appendix 4.

32. This latter name was the original name of MECCA's bill and was adopted by mutual agreement between MECCA and the Lawyers' Committee.



land as long as other air, water, or land was not harmed.<sup>33</sup> The term "quietude"<sup>34</sup> was added to the list which defines natural resources. In addition, a provision was added to what is now Section 116B.09, the Section dealing with intervention into administrative proceedings, which provided that "[e]conomic considerations alone shall not justify such conduct, program, or product."

During the next few meetings, both MECCA and the Pollution Control Agency (PCA) introduced a number of amendments. The MECCA amendments included adding damages as a remedy, specifically defining pollution and eliminating the defense of "no feasible and prudent alternative."<sup>35</sup> All of these amendments were defeated. The PCA amendment included a definition of pollution, a provision on scope of review where the PCA is involved, a venue provision and a shift in the burden of proof to the defendant where the plaintiff makes a prima facie showing that the defendant is violating or is likely to violate a PCA standard or rule. All of these passed. One major amendment failed to pass. The PCA introduced a version of what is now Section 116B.10, which allows challenges to agency standards. However, at the same meeting another version of it was adopted. The most critical difference between the two versions was that the PCA amendment incorporated the Administrative Procedure Act while the one which was finally adopted did not do so.<sup>36</sup>

At the last hearing, several amendments were introduced which had been drafted by MACI. One would have defined pollution only in terms of a violation of an agency rule. Another would have required notice within 60 days to "appropriate government units" before commencing a suit. The other amendment of major significance would have eliminated any shift in the burden of proof. All of these were defeated.<sup>37</sup> Representative Nelson stated that proponents of the bill were successful because they were able to demonstrate that these amend-

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33. MINN. STAT. § 116B.03(1) (1971).

34. *Id.* at § 116B.02(4). This took on added importance when, late in the 1971 legislative session, a bill on noise control was passed. Minn. Laws 1971, ch. 727, *amending* MINN. STAT. § 116.06 (1971).

35. A copy of these amendments, as introduced, is contained in the Official House Judiciary Subcommittee Report, H.F. 284, Exhibits B, C and D.

36. *Id.* at Exhibit F.

37. *Id.* at Exhibits J and J-1.

ments would have restricted the operation of H.F. 284 in a manner disproportionate to any problems they could solve.<sup>38</sup>

The amendments proposed by MACI were characteristic of the tactical position taken by special interest groups which lobbied against H.F. 284. The amendments were designed to effectively limit the operation of the bill but not kill it entirely. Pollution and environmental protection were important public issues during 1971 and very few groups or individuals wanted to appear totally opposed to the bill.

The last subcommittee meeting was on March 22. After passing out of the subcommittee, the bill went before the full House Judiciary Committee. With Rep. Albertson as chairman and with Rep. Nelson doing much of the groundwork, the bill passed by a 20 to 7 vote. It was then sent to the Government Operations Committee, chaired by Rep. Newcomb. The bill was bottled up in this committee until May.

In the Senate, both the MECCA bill and the Lawyers' bill had been sent to Sen. Ukelburg's Natural Resources and Environment Committee. No hearings were held on the bills during February or March, and it was apparent that the legislation would die there if left in that committee. The Senate majority caucus was aware of the situation and, due to a combination of lobbying, newspaper coverage and letter writing, they decided to take the bill out of Sen. Ukelburg's committee. It was sent to Sen. Popham's Civil Administration Committee. Senator Popham was an author of the Lawyers' bill (S.F. 418) and, in general, had been a supporter of environmental legislation. An initial hearing was set for April 1, in the State Department Subcommittee.

At the first hearing, it was moved that the subcommittee adopt the version of H.F. 284 which had been passed by the House Judiciary Committee. However, no vote was taken at this meeting, and instead, most of the time was taken by attacks on S.F. 418 by MACI and Sen. Dosland, an influential Conservative and chairman of the Senate Judiciary Committee. MACI proposed the same set of amendments as were voted down in the House by the subcommittee, still trying to water the bill down as much as possible. Sen. Dosland's criticism was somewhat different. He felt the bill should be limited to upgrading state agency powers, an approach consistent with his

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38. Interview with Rep. Rolf Nelson, member of the House Judiciary Committee, in Minneapolis, Minnesota, Aug. 23, 1971.

past activity in environmental legislation. He had been a strong supporter of PCA legislation<sup>39</sup> and earlier in the legislative session had introduced a bill which would have given the PCA considerably more power.<sup>40</sup>

At the conclusion of this meeting, proponents of S.F. 418 concluded that they would have to make some compromises.<sup>41</sup> Consequently, the Lawyers' Committee met with MACI, several legislators, and various other interested groups during the first two weeks in April. After considerable discussion, what was thought to be a workable compromise was reached. Proponents agreed not to contest amendments which would make compliance with PCA, Department of Natural Resources, Department of Health and Department of Agriculture rules a complete defense for a defendant. In exchange, it was agreed that where any two of these agencies had conflicting standards the most stringent would control. It was also agreed that the bill would contain the same section on challenging agency standards as was included in H.F. 284.

The next fruitful Senate subcommittee meeting was on April 29. Time was of the essence at this point because bills which have not cleared committee by April 30 have to be referred to the Rules Committee. The situation was further complicated by what proponents of the bill felt was a surprise move by Sen. Dosland.<sup>42</sup> He proposed that Sections 3 through 8 be deleted from the bill, cutting out actions to enforce environmental quality standards and actions to enjoin conduct which materially adversely affects the environment, but leaving intact those provisions involving administrative proceedings and review thereof and challenges to environmental quality standards. This amendment passed, and the subcommittee then promptly passed S.F. 418, such as remained of it. While Sen. Dosland's amendment was a disaster from one point of view,

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39. Interview with Robert V. Johnson, assistant attorney for the Minnesota Pollution Control Agency, in Minneapolis, Minnesota, Sept. 2, 1971.

40. S.F. 572. This bill was designed to give the PCA additional enforcement power by providing procedures for civil penalties previously unavailable. It was passed by the Senate but was killed in the House in Rep. Gustafson's Environmental Preservation Committee.

41. Interview with John M. Broeker, member of the Environmental Law Subcommittee of the Minnesota Bar Association, in Minneapolis, Minnesota, Sept. 7, 1971.

42. Interview with Richard N. Flint, chairman of the Environmental Law Subcommittee of the Minnesota Bar Association, in Minneapolis, Minnesota, Sept. 9, 1971.

it was beneficial from another; it allowed the bill to get out of the subcommittee on that same day.<sup>43</sup>

A meeting of the full Civil Administration Committee was called for the following evening. The full committee was more receptive to the bill than the subcommittee had been. They voted to restore Sections 3 through 8. However, a number of restrictive amendments were also adopted. Natural persons were excluded from either suing or being sued under the bill. The definition of pollution was narrowed by striking language which made prospective harm to the environment actionable. A provision was added to Section 3(1) which underscored the defense of compliance with PCA, Department of Natural Resources, Department of Health and Department of Agriculture rules and regulations which was already set out in Section 4. A final amendment was passed which made the bill expire on July 1, 1975. The bill was then passed and sent to the Senate floor. Although proponents of the bill were to later fight all of these amendments, it was felt that to do so in the Civil Administration Committee would have permanently stalled the bill.<sup>44</sup>

In the House, the bill had not been considered since its referral to Rep. Newcomb's Government Operations Committee. With the April 30 deadline in mind, proponents initiated a letter-writing campaign. The Conservative caucus in the House began to feel it was unwise to let Rep. Newcomb kill the bill. After Rep. Nelson agreed to the inclusion of the amendments previously worked out with MACI, including one which eliminated shifting the burden of proof on the issue of pollution, the caucus made certain that the bill was given a hearing. After 10 minutes of discussion, the Government Operations Committee passed the bill on May 4, but not before another amendment was added excluding violations of odor pollution

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43. Sen. Dosland probably could have prevented the bill from leaving the subcommittee in any form. His actions at the April 29 meeting may be explained by events which took place a week earlier. John Broeker, chairman of the North Star Chapter of the Sierra Club, made a speech in Moorhead, Minnesota, which is Sen. Dosland's home town. He charged Sen. Dosland with opposing and seriously threatening the bill. The speech was reported in the *Fargo-Moorhead Forum* on April 22, 1971. In the same article, Sen. Dosland replied by stating that he supported some of the concepts in the bill but that it required further amendment before he could completely endorse it.

44. Interview with Will H. Hartfeldt, member of the Environmental Law Subcommittee of the Minnesota Bar Association, in St. Paul, Minnesota, Sept. 13, 1971.

standards and rules from the jurisdiction of the bill.<sup>45</sup> Because the April 30 deadline had passed, the bill had to be sent to the Rules Committee which passed it and promptly sent it to the floor of the House.

Because the House version of the bill was stronger, proponents wanted the House to vote on H.F. 284 before the Senate acted on S.F. 418. However, Sen. Kirchner was unable to put off the vote in the Senate, and it took place on May 13. Because the Lawyers' Committee had been confident the vote could be put off, they were not in attendance that day. Senator Dosland proposed what he called housekeeping amendments. One restricted the definition of pollution to what amounted to a violation of agency standards and, because of the way the amendment was worded, few legislators realized the effect it would have. He also proposed that farmers and farm corporations be exempted from the definition of who could be sued. Both of these amendments passed. Senators Wolfe and Davies proposed amendments which, on the surface, appeared to restrict the bill even more than Sen. Dosland's amendments and these were narrowly defeated. The bill was then passed by a 64 to 0 vote. Although the Lawyers' Committee was relieved the bill had at least passed the Senate, they were firmly against accepting the definition of pollution which had been inserted. They wanted a definition which provided for actions to enjoin conduct which materially adversely affects the environment, not merely for enforcement of agency rules and regulations.<sup>46</sup>

As the final week of the regular legislative session began, the House had not voted on the bill, now the House version of S.F. 418. Due mostly to the efforts of Rep. Nelson, the bill was put on the consent calendar on May 20, three days before the end of the regular session. The proponents agreed to include provisions which protected farmers from being sued, but were able to draft it themselves. Despite this, most rural legislators voted against the bill, and it passed by a 98 to 33 margin.

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45. The PCA had issued a revision of its rules on odors which eliminated a provision exempting farm and other natural odors. This was a mistake and a correction letter was later mailed out. However, this action brought considerable pressure on the bill from rural legislators.

46. Interview with Will H. Hartfeldt, member of the Environmental Law Subcommittee of the Minnesota Bar Association, in St. Paul, Minnesota, Sept. 13, 1971.

The Lawyers' Committee wanted the Senate to vote on the House version of S.F. 418. However, Sen. Kirchner moved that a conference committee be formed instead of moving for a vote.<sup>47</sup> After considerable discussion, the Conference Committee reached the following compromise: the House (1) agreed to accept Sen. Dosland's farm exceptions, (2) conceded the proviso contained in the Senate version underscoring the Section 4 defense of compliance with regulations of the four specified agencies and departments, and (3) the House accepted Sen. Dosland's provision which specified that the court can grant costs to a defendant for injury caused by a temporary injunction where the defendant prevails at trial.<sup>48</sup> However, the House was able to prevail on the more crucial points. A provision was added to the definition of pollution which provided for actions to enjoin conduct which materially adversely affects the environment. The language making conduct which "is likely to" harm the environment actionable was also put back into the bill,<sup>49</sup> and the 1975 expiration date was eliminated. The bill, designated as S.F. 418, was then sent back and passed by both the House and Senate.

A combination of factors coalesced to bring about the passage of S.F. 418. The political climate was ripe in 1971 for this type of legislation, and there was never an organized opposition to the bill within the legislature. The Governor was a Liberal and had introduced similar legislation in the previous legislative session when he was a state senator. The Conservatives, in general, saw the bill as an opportunity to take the lead in the ecology field in the state. The Lawyers' Committee organized early and its members were willing to spend a considerable amount of time working to pass the bill. They also were careful in selecting authors. The selection of Rep. Nelson was probably the best choice they could have made for a primary author in the House. The opposition was formidable but was somewhat restrained by public opinion; no one seemed willing to be given credit for killing the bill outright. Extensive newspaper coverage and the letter writing campaign organized by the Lawyers' Committee had a great deal to do with this.

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47. The members of this committee were Reps. Nelson, Newcomb and Savelkoul and Sens. Bergerud, Dosland and Kirchner.

48. Minn. Rules Civ. P., Rule 65.03 already provided this.

49. These two conference committee changes were the most crucial ones. Without them, plaintiffs under the Rights Act would have had no way to sue alleged polluters unless they were currently in violation of an environmental quality standard.

III. THE OPERATION OF THE RIGHTS ACT<sup>50</sup>

## A. INTRODUCTION

The Minnesota Environmental Rights Act states that "each person is entitled by right to the protection, preservation, and enhancement of air, water, land and other natural resources located within the state . . . ."<sup>51</sup> In order to give effect to these rights, the Act declares "it is in the public interest to provide an adequate civil remedy to protect" these resources.<sup>52</sup> It authorizes four types of actions by which an "adequate civil remedy" may be obtained: (1) actions to enjoin conduct which materially adversely affects the environment;<sup>53</sup> (2) actions to enforce existing environmental quality standards and regulations;<sup>54</sup> (3) actions involving intervention into administrative proceedings or judicial review thereof which concern environmental matters;<sup>55</sup> and (4) actions against state agencies challenging the adequacy of environmental quality standards and permits issued by them.<sup>56</sup>

In parts B, C and D of this section, these four methods will be analyzed within the context of several hypothetical fact situations. This approach was selected for two reasons. First, it makes the analysis of the Act less abstract than it might otherwise be. Second, the Act is really a series of rather closed systems for protecting the environment through judicial action. This can best be illustrated through the use of hypothetical situations. However, the emphasis will be on the Act itself, not on the resolution of each issue raised by the hypotheticals.

Part B contains a situation involving the discharge of sewage into a lake and the use of the Rights Act to enjoin such pollution, impairment or destruction of the environment. Part C centers on crop spraying which is possibly in violation of an environmental quality regulation and the use of the Rights Act to enforce that regulation. Part D involves the promulgation by an agency of an environmental quality standard. It

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50. The Rights Act will be herein interpreted and analyzed. However, because the Act is lengthy, complex and, in several places, ambiguous, it should be read completely before proceeding further. The text of the Act is set forth in the Appendix.

51. MINN. STAT. § 116B.01 (1971).

52. *Id.*

53. *See id.* at §§ 116B.02(5), 116B.03(1).

54. *Id.*

55. *Id.* at § 116B.09(1).

56. *Id.* at § 116B.10(1).

illustrates how intervention into administrative hearings on conduct potentially harmful to the environment and the resulting judicial review of those proceedings can be effected. It also discusses the use of the Act to challenge the promulgation by a state agency of an environmental quality standard which is inadequate to protect the environment.

B. ACTION TO ENJOIN CONDUCT WHICH MATERIALLY  
ADVERSELY AFFECTS THE ENVIRONMENT

County X, located in Minnesota, recently enacted a shoreland protection ordinance, pursuant to the Regulation of Shoreland Development Act.<sup>57</sup> This ordinance is basically the same as the Model Shoreland Protection Ordinance drafted by the Minnesota Department of Natural Resources (DNR).<sup>58</sup> In compliance with the county ordinance, Corporation Y, a "family farm corporation,"<sup>59</sup> applied for and received a permit to construct a large number of multi-family rentals units on the lakeshore of a Recreational Development Lake<sup>60</sup> in an unin-

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57. MINN. STAT. § 105.485 (1971). The overall purpose of the Shoreland Act is to protect the shorelands of lakes and streams in unincorporated areas of each county through the adoption by all counties of a shoreland protection ordinance. In order to facilitate this, Subdivision (3) directs the Commissioner of Natural Resources to develop and promulgate model standards and criteria which include:

(a) The area of a lot and length of water frontage suitable for a building site; (b) the placement of structures in relation to shorelines and roads; (c) the placement and construction of sanitary and waste disposal facilities; (d) designation of types of land uses; (e) changes in bottom contours of adjacent public waters; (f) preservation of natural shorelands through the restriction of land uses; (g) variances from the minimum standards and criteria; and (h) a model ordinance.

Subdivision (4) specifies that each county must adopt its own shoreland protection ordinance by July 1, 1972, and that it must meet the minimum standards set by the Commissioner. In the event this does not occur, the Commissioner is directed to adopt such an ordinance for the county and to charge any costs of doing so to it.

58. MINN. CONSERVATION REGS. 70-84 [hereinafter cited as CONS. REGS.] This publication contains the minimum standards and criteria as well as the model ordinance which the Commissioner of Natural Resources is directed to promulgate by MINN. STAT. § 105.485(3) (1971).

59. See note 66 *infra*.

60. CONS. REGS. 71(a)(2)(bb). The management goals and objectives set forth for this type of lake are:

to provide management policies reasonably consistent with existing development and use; to provide for the beneficial use of public waters by the general public, as well as the riparian owners; to provide a balance between the lake resource and lake use; to provide for a multiplicity of lake uses; and to protect areas unsuitable for residential and commercial uses from development.

*Id.*



corporated area of the county. It also complied with the location standards for septic tank soil absorption systems in the county ordinance<sup>61</sup> and received a permit for the installation of this sewage disposal system.<sup>62</sup>

Several months after the rental units were completed and put into operation, some lakeshore property owners filed suit against Corporation Y under the authority of Section 116B.03 (1) of the Rights Act, which provides that an action can be maintained by

[a]ny person residing within the state . . . for declaratory or equitable relief in the name of the state of Minnesota against any person, for the protection of . . . natural resources located within the state, whether publicly or privately owned, from pollution, impairment, or destruction.

The complaint alleges that the defendant's disposal systems are discharging various nutrients into underground streams which feed into the lake and that these nutrients promote the growth of undesirable plant life, thereby impairing the aesthetic value of the lake,<sup>63</sup> and contribute to the general reduction of the lake's water quality. It is further alleged that this constitutes "pollution, impairment or destruction"<sup>64</sup> of the lake, which is defined, in part, as "any conduct which materially adversely affects or is likely to materially adversely affect the environment."<sup>65</sup> Plaintiffs have requested a permanent injunction pro-

61. CONS. REGS. 77 (3.36). This part of the Model Ordinance specifies that

[p]lacement of soil absorption systems shall be in accordance with the public waters classification of the applicable public water body and shall be subject to the following specifications, where soil conditions are adequate; . . . (2) On Recreational Development Lakes, at least 75 feet from the normal high water mark.

62. CONS. REGS. 77 (7.52).

63. MINN. STAT. § 116B.02(4) (1971). This provision, which defines natural resources, states that "[s]cenic and esthetic resources shall also be considered natural resources when owned by any governmental unit or agency."

64. *Id.* at § 116B.02(5).

65. Pollution is defined as a violation of "any environmental quality standard, limitation . . . or permit . . . ." *Id.*

The entire definition is qualified by the proviso that it shall not include conduct which violates, or is likely to violate, any such standard, limitation . . . or permit solely because of the introduction of an odor into the air.

*Id.*

This provision was added as an amendment late in the 1971 legislative session and was a response to a revision of an order issued by the PCA. The effect of this new order was to no longer exempt farm odors from prosecution. This was a mistake and was later rescinded, but not before rural legislators had reacted. Interestingly, the provi-

hibiting the operation of the rental units until a different and more effective sewage disposal system can be installed.

### 1. *Motions to Dismiss*

One ground upon which Corporation Y might attempt to obtain a dismissal is that, while Section 116B.03(1) does authorize an action to be maintained against "any person," it is a "family farm corporation"<sup>66</sup> and is not a "person," which is defined as

any natural person, any state, municipality or other governmental or political subdivision . . . and any other entity, except a family farm, a family farm corporation or a bonafide farmer corporation.<sup>67</sup>

Based on this definition, a court could conclude that the farm related exceptions are clear, unambiguous and not open to judicial construction.<sup>68</sup> It could hold that any entity falling within these exclusions cannot be sued under any circumstances by virtue of any authority in the Rights Act.

However, such a construction of the Rights Act would seem inappropriate for several reasons. The Minnesota Supreme Court has stated that the "ultimate goal" in interpreting a statute is "to ascertain and give effect to the intention of the legislature."<sup>69</sup> Since the amendment which established these

sion really gives little protection to farmers or anyone else whose conduct causes odors to be introduced into the air. Action under the Rights Act is prohibited only if based solely on the violation of some standard or permit. If the odor violation is alleged together with other charges or if there is no applicable standard or permit, the introduction of odors into the air is actionable under the Act.

66. *Id.* at § 116B.02(7). This is defined as a corporation

[f]ounded for the purposes of farming and owning agricultural land, in which the majority of the voting stock is held by, and the majority of the stockholders are, members of a family related to each other within the third degree of kindred according to the rules of the civil law, and at least one of whose stockholders is a person residing on or actively operating the farm, and none of whose stockholders are corporations.

This definition does not preclude such a corporation from operating a number of rental units in addition to farming. For purposes of illustration, it will be assumed that Corporation Y is a "family farm corporation."

67. *Id.* at § 116B.02(2).

68. *Lahr v. City of St. Cloud*, 246 Minn. 489, 494 n.10, 76 N.W.2d 119, 122 n.9 (1956); *Minneapolis-St. Paul Sanitary Dist. v. City of St. Paul*, 240 Minn. 434, 437, 61 N.W.2d 533, 535-36 (1953). MINN. STAT. § 645.16 (1967) states, in part, that "[w]hen the words of a law in their application to an existing situation are clear and free from all ambiguity, the letter of the law shall not be disregarded under the pretext of pursuing the spirit."

69. *Lenz v. Coon Creek Watershed Dist.*, 278 Minn. 1, 9, 153 N.W.2d

exceptions was mainly supported by rural legislators who feared their farming constituents might be harassed by the bill as it then existed,<sup>70</sup> the exceptions should be read as relating only to farming activities. It is very unlikely that the legislature which enacted this environmental protection statute had any intention to exempt a party from being sued under the Act for nonfarm activities merely because the party also engaged in farming. Moreover, the strict reading of the definition of "person" which Corporation Y proposes would lead to two rather absurd results. First, since "any person" is authorized to maintain an action under Sections 116B.03, 116B.09 and 116B.10 of the Rights Act, anyone so engaged in farming would be excluded.<sup>71</sup> And second, since the Act specifies "that each person is entitled by right to protection" of natural resources in the state,<sup>72</sup> anyone engaging in farming would be without such rights.

Corporation Y could also move for a dismissal on the ground that the conduct at issue is pursuant to both a DNR environmental quality standard and a permit. This argument would be based on Section 116B.03(1) which provides that:

[n]o action shall be allowable under this section for conduct taken by a person pursuant to any environmental quality standard, limitation . . . or permit issued by the pollution control agency, department of natural resources, department of health or department of agriculture.

Essentially, the defendant's argument has three parts: (1) the DNR's Model Shoreland Protection Ordinance is an "environmental quality standard, [or] limitation;" (2) a county ordinance which adopts the Model Shoreland Protection Ordinance should be accorded the status of a DNR environmental quality standard; (3) Corporation Y is in complete compliance with the

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209, 216 (1967); *County of Hennepin v. City of Hopkins*, 239 Minn. 357, 362, 58 N.W.2d 851, 854 (1953). Where the statute is not completely free of all ambiguity, provision is made in MINN. STAT. § 645.16 (1967) for ascertaining the legislative intent. In doing so, one of the statutory presumptions is that the "legislature intends to favor the public interest as against any private interest." MINN. STAT. § 645.17(5) (1967).

70. Interview with Rep. Rolf Nelson, member of the House Judiciary Committee, in Minneapolis, Minnesota, Aug. 23, 1971.

71. There is a possibility that even if the farm-related exceptions were literally construed, a natural person who owned a "family farm," "family farm corporation" or "bona fide farmer corporation" could have standing under the Rights Act. The farm related exceptions are all artificial entities; although the entity itself may not have standing, those natural persons owning such entities could still maintain an action under the Act.

72. MINN. STAT. § 116B.01 (1971).

county ordinance. For purposes of illustration, it will be assumed that Corporation Y is in compliance with the county ordinance. It is suggested, however, that defendant's arguments fail and the motion to dismiss should be denied.

The first proposition underlying the defendant's argument can be challenged on the ground that an "environmental quality standard" must have the force of law and that the Model Shoreland Protection Ordinance lacks such force. Since pollution is defined as a violation of an "environmental quality standard,"<sup>73</sup> if such standards are not restricted to those having the force of law, the definition becomes immensely expansive. For example, the Department of Health has published standards relating to sanitation which were intended only to be recommendations.<sup>74</sup> Certainly these could literally be construed as "environmental quality standards," but such a construction would expose vast numbers of persons to suit under the Rights Act for failure to comply with only recommended standards. Also, in view of the fact that pollution is also defined as "conduct which materially adversely affects" the environment,<sup>75</sup> no further expansion of the definition seems warranted.

Whether or not the Model Shoreland Protection Ordinance has the force of law with respect to actual pollution standards is not altogether clear. It does contain suggested minimum standards for the adoption of shoreland protection ordinances by the counties in the state.<sup>76</sup> Also, it seems likely that a county ordinance which copies the Model Ordinance would be approved by the DNR.<sup>77</sup> Moreover, since the DNR has the final determination of the adequacy of the ordinance, it could be argued that an ordinance which is approved is incorporated by reference. However, the purpose of the Regulation of Shoreland Development Act was not to impose state regulations on each county, but rather to ensure that counties adopted their own ordinances to protect lakes and shorelines. The Model Shoreland Protection Ordinance was drafted by the DNR only

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73. *Id.* at § 116B.02(5).

74. MINNESOTA INDIVIDUAL SEWAGE SYSTEM CODE, MINIMUM STANDARDS RECOMMENDED BY THE MINNESOTA DEPARTMENT OF HEALTH (1972). However, failure to follow these recommendations may well result in violation of PCA regulations. Interview with Frederick F. Heisel, Director, Division of Environmental Health, Minnesota Dept. of Health, in Minneapolis, Minnesota, February 18, 1971.

75. MINN. STAT. § 116B.02(5) (1971).

76. See note 58 *supra*.

77. Interview with James W. Menter, drafter of the Model Shoreland Protection Ordinance, in St. Paul, Minnesota, August 15, 1971.

for illustrative purposes to aid the individual counties in drafting their own ordinances.<sup>78</sup> In fact, the Model Ordinance states that its adoption verbatim or by reference will not necessarily constitute an adequate ordinance.<sup>79</sup> Only in the event that a county failed to draft an ordinance or drafted a deficient one would the DNR be authorized to draft one for that county.<sup>80</sup>

Even if it could be established that the Model Shoreland Protection Ordinance was an "environmental quality standard," Corporation Y would still have to establish that the county ordinance should be accorded the status of a DNR environmental quality ordinance. The legislative history of the provision in Section 116B.03(1) upon which the motion to dismiss is based indicates that the county ordinance should not be given such status. The original version of that provision was proposed by the Minnesota Association of Commerce and Industry<sup>81</sup> and would have made compliance with any environmental quality standard a defense to an action where the conduct at issue is alleged to be "materially adversely affecting" the environment. The present provision is the result of a compromise<sup>82</sup> and has a considerably narrower scope; only standards of the "pollution control agency, department of natural resources, department of health or department of agriculture"<sup>83</sup> provide a statutory defense if complied with. However, the reason behind the provision does lend some support to the defendant's position. It was designed to protect those business concerns which relied upon and complied with environmental quality standards issued by these agencies in order to facilitate long range planning. This purpose is somewhat satisfied by the reliance upon and compliance with the county ordinance by Corporation Y.

The fact remains, however, that the county enacted the standards for the sewage system being utilized by the defendant and issued the permit which Corporation Y needed. In addition, it is the county which has the sole authority to enforce the standards. The DNR's guidelines for adoption of county shoreland protection ordinances specify that "it is the duty of the

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78. MINN. STAT. § 105.485 (3) (1971).

79. CONS. REGS. 76.

80. MINN. STAT. § 105.485 (4) (1971).

81. Interview with Richard N. Flint, chairman of the Environmental Law Subcommittee of the Minnesota Bar Association, in Minneapolis, Minnesota, August 30, 1971.

82. See text following note 41 *supra*.

83. MINN. STAT. § 116B.03(1) (1971). [This group of agencies is hereinafter cited as the "four specified agencies."]

county to . . . provide for the administration and enforcement of the ordinance it adopts."<sup>84</sup> And this is consistent with the position taken by the DNR at a recent hearing,<sup>85</sup> that minus specific statutory authority, it has no direct power over local land use.

## 2. *Trial, Burden of Proof and Defenses*

Assuming the motions to dismiss have been defeated, the plaintiffs' next concerns would be the requirements regarding the production of evidence and the anticipation of defenses which might be raised at trial. These aspects of a trial are dealt with in Section 116B.04 of the Rights Act, which contains two paragraphs. The first deals exclusively with cases involving an alleged violation of an environmental quality standard issued by one of the four specified agencies. As discussed in the previous material, such a regulation is probably not involved in this case. When an environmental quality standard of one of these agencies is not involved, the second paragraph of Section 116B.04 is the controlling provision.

There are two basic groups of cases which come under this paragraph: (1) cases where it is alleged that the defendant's conduct violates an environmental quality standard issued by some agency other than the four specified ones;<sup>86</sup> and (2) suits, such as the instant one, to enjoin conduct which allegedly "materially adversely affects or is likely to materially adversely affect the environment."<sup>87</sup>

### a. Vagueness

This latter definition of pollution could conceivably be challenged on the ground that it is so vague that a person cannot

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84. CONS. REGS. 75(a); *accord*, CONS. REGS. 77 (7.6).

85. Application of Herbert Schultz, proceedings before Minn. Dep't Conservation, P.A. 69-346 (Oct. 7, 1969), Transcript at 43-44. Conservationists argued that the permit to dredge the channel should be denied because the applicants planned to build summer homes on nearby shoreland but had failed to provide for adequate lot sizes or sewage disposal. The Department said that, in its opinion, it has no control over those factors.

86. The complaint in this hypothetical case did not allege a violation of any environmental quality regulation. If it had alleged that Corporation Y was in violation of the county shoreland protection ordinance, then assuming the county ordinance is not accorded the status of a DNR environmental quality standard, the case would have still been controlled by the second paragraph of MINN. STAT. § 116B.04, not the first paragraph.

87. MINN. STAT. § 116B.02(5) (1971).

reasonably estimate whether his conduct will be actionable. It is suggested, however, that, while not precise, this definition is certain enough to withstand the constitutional attack of vagueness.<sup>88</sup>

In Minnesota, decisions on the constitutional requirements of statutory certainty have varied. In some criminal cases, the Minnesota Supreme Court has tended to be stringent and require a statute to give fairly explicit warning.<sup>89</sup> In other cases, however, the supreme court has shown greater flexibility. For example, in *City of St. Paul v. Haugbro*,<sup>90</sup> a case involving a vagueness challenge to an ordinance prohibiting the discharge of "dense smoke" from chimneys, the court said:

The terms used will be understood as commonly employed and this court will understand by "dense smoke" . . . a volume of

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88. *But cf.* *Roberts v. State of Michigan*, Civil No. 12428-C (Cir. Ct., Ingham Cty., filed May 4, 1971). This case presented the question of whether, under the Michigan Environmental Protection Act, the operation of motor vehicles is a major cause of pollution and, if so, whether injunctive relief could be obtained against the State to prevent the

further issuance of licenses to operators of motor vehicles, to prevent the use of streets and highways, and to prevent the use of tax monies for the construction of highways etc. until sufficient safeguards, standards, rules and regulations are adopted and enforced.

*Id.* at 1. The court held that "[a]t least as applied to the matter of alleged pollution arising from the operation of motor vehicles," the Act is unconstitutional. *Id.* at 3. However, the decision was not based on the definition of pollution but on the fact that the Act "purports to delegate legislative authority and responsibility to the courts." *Id.* at 3.

There are several reasons why this decision should be limited to its facts. First, neither party raised, briefed or argued any constitutional issue. The decision to deny the relief did not require a decision on any constitutional issue, since it could simply have been denied as a matter of equitable discretion. Second, even if the holding is proper, it only invalidates the Act in a narrow factual situation—where the plaintiff requests the court to overrule standards set by the legislature itself. But even this may be qualified since the plaintiffs in *Roberts* were asking the court to enforce legislative standards contained in the Michigan Environmental Protection Act. Letter from Joseph L. Sax to John M. Broeker, Sept. 14, 1971, on file with Mr. Broeker in Minneapolis, Minnesota.

89. *State v. Target Stores, Inc.*, 279 Minn. 447, 156 N.W.2d 908 (1968). The court answered a vagueness challenge to a Sunday Closing statute by stating that it would follow the rule announced by the United States Supreme Court in *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926):

[A criminal] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law.

90. 93 Minn. 59, 100 N.W. 470 (1904).

dark, dense smoke as it comes from the smoke stack or chimney . . . .<sup>91</sup>

The Rights Act, however, provides only a "civil remedy"<sup>92</sup> and, therefore, the courts in Minnesota would presumably show even greater tolerance. Hopefully, Minnesota courts will adopt the reasoning of the Texas Court of Appeals in *Houston Compressed Steel v. Texas*.<sup>93</sup> That case involved the alleged lack of specificity in a statute defining "air pollution" as

the presence in the atmosphere of one or more air contaminants or combinations thereof, in such concentration and of such duration as are or may tend to be injurious or to adversely affect human health or welfare, animal life, vegetation or property, or as to interfere with the normal use and enjoyment of animal life, vegetation or property.<sup>94</sup>

The court answered the vagueness challenge by saying

[t]he science of air pollution control is new and inexact, and these standards are difficult to devise, but if they are to be effective they must be broad. If they are too precise they will provide easy escape for those who wish to circumvent the law.<sup>95</sup>

#### b. Burden of Proof

At this point, the plaintiffs must go forward and establish a "prima facie showing that the conduct of the defendant has, or is likely to cause the pollution, impairment, or destruction" of natural resources in the state.<sup>96</sup> There is no doubt that the plaintiffs will have the initial burden of production, since it is only after the prima facie showing is established that the Rights Act specifies that "the defendant may rebut the prima facie showing by the submission of evidence to the contrary."<sup>97</sup>

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91. *Id.* at 63, 100 N.W. at 472. Cf. *Walker v. Corwin*, 210 Minn. 337, 300 N.W. 800 (1941). That case involved the revocation of a license to practice veterinary medicine. The court upheld a statute which made "gross moral or professional misconduct" grounds for revocation. In answering the challenge that such a standard is defective due to vagueness, the court said:

Mere difficulty in ascertaining whether close cases fall within its operation does not nullify a statute if by the measure stated it can be determined with reasonable certainty whether particular conduct is disapproved.

*Id.* at 340, 300 N.W. at 801.

92. MINN. STAT. § 116B.01 (1971).

93. 456 S.W.2d 768 (Tex. 1970).

94. TEX. REV. CIV. STAT. art. 4477-5, § 1.03(3) (1971).

95. 456 S.W.2d at 774. It is likely that the point in time at which an injunction is sought will have an impact on the issue of vagueness. If a defendant has already invested considerable time and money, the courts would probably take a more restrictive position than if the conduct at issue were only at an early stage.

96. MINN. STAT. § 116B.04 (1971).

97. *Id.*



It also appears that the overall burden of persuasion is on the plaintiffs. At one point during the House subcommittee hearings, the bill contained a provision explicitly shifting this burden to the defendant if the above prima facie showing were established.<sup>98</sup> However, this provision was subsequently deleted and, as the second paragraph of Section 116B.04 now stands, there is no suggestion that the overall burden of persuasion has been shifted to the defendant.<sup>99</sup>

A closely connected question, which may arise under either the first or second paragraphs of Section 116B.04, is the meaning of "prima facie showing." There are two distinguishable senses in which this phrase is generally used. First, it is used to refer to the rule that when evidence has been advanced by the party bearing the risk of nonpersuasion upon an issue, this advancement will not only sustain that burden, but also shift the duty of going forward with the evidence to the adverse party. As used in this sense, "prima facie showing" works as a presumption such that if the adverse party fails to produce at least some evidence, the party establishing the prima facie showing prevails.<sup>100</sup> Second, "prima facie showing" is used to refer to a production of evidence advanced by the party bearing the risk of nonpersuasion upon an issue such as will entitle him to have that issue tried by the jury. In this sense, it means that the proponent on an issue has advanced sufficient evidence to relieve him of the hazard of nonsuit or a directed verdict.<sup>101</sup>

Although Section 116B.04 does not specify in which sense it is using "prima facie showing," there are several reasons to conclude that it is being used in the latter one. First, Section 116B.10(3) states that, in an action to challenge the adequacy of an environmental regulation, "if the plaintiff fails to establish said prima facie showing, the court shall dismiss the action . . . ." Although this is not specifically stated in Section 116B.04, the situation is identical. This use of "prima facie showing" is more consistent with the second definition set out above, although it is not completely inconsistent with the first

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98. H.F. 284, as passed by the House Judiciary Committee, March 22, 1971.

99. For a discussion of burden of proof in environmental litigation, see Krier, *Environmental Litigation and the Burden of Proof*, in *LAW AND THE ENVIRONMENT* 105-22 (M. Baldwin & J. Page, Jr. eds. 1970).

100. 9 J. WIGMORE, *EVIDENCE* § 2494(1), at 293 (3d ed. 1940).

101. *Id.* at § 2494(2), at 293-94.

one. Second, less evidence is generally required to satisfy the second type of *prima facie* showing. This is consistent with one of the primary goals of the Rights Act, namely, "to provide an adequate civil remedy to protect" natural resources in the state.<sup>102</sup> Finally, the second paragraph of Section 116B.04 states that the defendant "may rebut" the *prima facie* showing. This implies that no dismissal occurs if the defendant chooses not to rebut the *prima facie* showing. Such a result is consistent only with the second use of "*prima facie* showing."

### c. Defenses

Besides simply submitting rebuttal evidence, the second paragraph of Section 116B.04 also provides that the defendant

may also show, by way of an affirmative defense, that there is no feasible and prudent alternative and the conduct at issue is consistent with and reasonably required for promotion of the public health, safety, and welfare in light of the state's paramount concern for the protection of its air, water, land and other natural resources from pollution, impairment, or destruction.

Like other affirmative defenses, this one is procedurally governed by Minnesota Rule of Civil Procedure 8.03. It must be specifically pleaded or, unless the pleading is later amended, it is waived.<sup>103</sup> The overall burden of persuasion on the issue rests with the defendant.<sup>104</sup> The defense does not contest the allegation that the conduct at issue is causing pollution, but rather it is a way to avoid liability even if the allegation is true.

In order to utilize this affirmative defense, it must be shown that there is either no "feasible" alternative, or no "prudent" alternative. To establish the former, it would be necessary to show there is currently neither a technologically better way to conduct the activity which is causing the pollution nor a better method of cleaning up the polluting by-products of this activity. Assuming that there is a "feasible" alternative, the defendant would have to show that it is economically un-

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102. MINN. STAT. § 116B.01 (1971).

103. *Melbo v. Rinn*, 280 Minn. 72, 157 N.W.2d 842 (1968).

104. At one point during the 1971 legislative session, this paragraph stated that, following a *prima facie* showing by the plaintiff that the defendant's conduct was causing pollution, the defendant had the burden of proving what is now called the affirmative defense. This was later amended but without any significant change in the effect of the paragraph. There is little, if any, difference between calling something an affirmative defense and specifically stating the defendant has the burden of proving a certain defense.

reasonable in light of the benefits to be derived from the activity in order to prove it is not a "prudent" alternative.<sup>105</sup>

Even if the first part of the affirmative defense is proved, the defendant must still establish that "the conduct at issue is consistent with and reasonably required for promotion of the public health, safety, and welfare in light of the state's paramount concern for the protection" of its natural resources. Before it is decided if the conduct at issue satisfies this requirement, considerable balancing of interests is certain to take place. For example, if the defendant were a large manufacturer, a number of jobs could be lost if the affirmative defense were not established. The defendant could contend that the public "welfare" certainly encompasses the provision of jobs. On the other hand, the "public health" and the "state's paramount concern" for its natural resources demand that a court closely scrutinize the effects of the alleged pollution.

As applied to the instant hypothetical, where the conduct at issue is alleged to constitute pollution because it "materially adversely affects"<sup>106</sup> the lake, the affirmative defense is not incongruous with prior Minnesota law. In deciding whether the defense has been satisfied, as well as if there is, in fact, pollution, the courts will be balancing many of the considerations which they have taken into account in the past in deciding whether a nuisance has been committed.<sup>107</sup> However, the second paragraph of Section 116B.04 also encompasses cases where the conduct at issue is alleged to constitute pollution because

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105. This interpretation is similar to the one announced by the United States Supreme Court regarding the requirement of the Department of Transportation Act of 1966 (49 U.S.C.A. § 1653(f) (Supp. 1972) ) that the Secretary of the Department not provide funds for constructing highways using public parkland unless there is no "feasible and prudent" alternative. *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971), *rev'ing* 432 F.2d 1307 (6th Cir.), *aff'ing* 309 F. Supp. 1189 (W.D. Tenn. 1970). It held that an alternate route, which would not require the use of the parkland in question, is "feasible" unless its use would be against the principles of "sound engineering." 401 U.S. at 411. An alternate route was said to be "prudent" unless its use involved "cost or community disruption . . . [of] extraordinary magnitudes." *Id.* at 413.

106. MINN. STAT. § 116B.05(5) (1971).

107. See *Fish v. Hanna Coal & Ore Corp.*, 164 F. Supp. 870 (D. Minn. 1958); *Excelsior Baking Co. v. City of Northfield*, 247 Minn. 387, 77 N.W.2d 188 (1956); *Robinson v. Westman*, 224 Minn. 105, 29 N.W.2d 1 (1947); *Jedneak v. Minneapolis Gen. Elec. Co.*, 212 Minn. 226, 4 N.W.2d 346 (1942); *Brede v. Minnesota Crushed Stone Co.*, 143 Minn. 374, 173 N.W. 805 (1919). See also W. PROSSER, *LAW OF TORTS* § 87 (4th ed. 1971).

it violates an "environmental quality standard"<sup>108</sup> of some unit of government other than the four specified state agencies. As applied to this type of case, the affirmative defense is rather novel since it is a statutory affirmative defense to the violation of statutes and ordinances dealing with environmental protection.

The second paragraph of Section 116B.04 ends with the statement that "[e]conomic considerations alone shall not constitute a defense hereunder." It is not clear from the statute itself whether this was intended to qualify only the affirmative defense or whether it was intended to apply to any defenses raised in any action controlled by the second paragraph.<sup>109</sup> However, the legislative history indicates that it was intended to qualify only the specified affirmative defense.<sup>110</sup> The exact effect this provision has on the affirmative defense is also unclear. To the extent that the first part of the affirmative defense is considered an economic factor and the second part a noneconomic one, the provision in question could be read as reinforcing the fact that both parts of the defense must be proved in order to satisfy its requirements. However, this interpretation would make the sentence in question essentially superfluous, a result which the Minnesota Supreme Court has stated should be avoided where possible.<sup>111</sup> Alternatively, the sentence in question could be interpreted as applying to the whole second paragraph. If so, an alleged polluter would be unable to avail himself of any defense which is based on economic considerations alone.

This latter interpretation raises the question of whether there are any other defenses available in cases controlled by the second paragraph. There are two reasons why a court could conclude there are no other defenses. First, the language in the second paragraph suggests such a result. After the plaintiff makes a *prima facie* showing, "the defendant may rebut the *prima facie* showing" and "may also show, by way of an affirmative defense . . . ." Second, it is unlikely that the legislature intended to provide an additional defense to alleged

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108. MINN. STAT. § 116B.02(5) (1971).

109. A very unlikely, but theoretically possible, interpretation is that it qualifies defenses raised in actions controlled by both the first and second paragraphs.

110. See text accompanying notes 22-26 *supra*.

111. *Gale v. Commissioner of Taxation*, 228 Minn. 345, 349, 37 N.W. 2d 711, 715 (1949); *Hall Hardware Co. v. Gage*, 197 Minn. 619, 622, 268 N.W. 202, 204 (1936).

polluters. It is more likely that the specified affirmative defense was intended to be the only defense to an actual case of pollution.

### 3. *Relief*

Assuming the plaintiff has proved that the conduct at issue has caused or is likely to cause pollution, that the defendant has failed to satisfy the requirements of the affirmative defense and that there are no other applicable defenses, the court must decide on the request for a permanent injunction. Such relief is certainly available under the Rights Act, which provides that the court

may grant declaratory relief, temporary and permanent equitable relief, or may impose such conditions upon a party as are necessary or appropriate to protect the air, water, land or other natural resources located within the state from pollution, impairment, or destruction.<sup>112</sup>

This provision gives a court considerable statutory discretion to mold an appropriate remedy. In the instant hypothetical, some combination of an injunction and/or order to adopt an improved method of sewage disposal would clearly be authorized by this provision.<sup>113</sup>

### C. A SUIT FOR VIOLATION OF AN ENVIRONMENTAL PERMIT

Corporation X is a Minnesota manufacturer of frozen and canned vegetables. It grows its own produce and in the process sprays its crops with DDT. Because of the possible danger DDT poses to human health and the definite threat it presents to fish and wildlife, the use of this chemical has been restricted to persons who have been issued permits by the Minnesota Department of Agriculture.<sup>114</sup> Corporation X currently holds such a permit which regulates the time and manner of spraying and requires that the user take all reasonable precautions in spraying to prevent the spread of the pesticide to land other than its own.

A conservation group, some members of which own land adjacent to the fields of Corporation X, has filed suit in the state district court under the authority of Section 116B.03 of the Rights Act. The complaint alleges that the corporation is vio-

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112. MINN. STAT. § 116B.07 (1971).

113. For a further discussion of relief available under Section 116B.07, see text accompanying notes 167-72 *infra*.

114. MINN. STAT. § 18.032 (1969).

lating its permit by not taking all reasonable steps to ensure against the spread of the pesticide and that this conduct is the cause of DDT spreading from the defendant's fields to adjacent land, thereby endangering the wildlife which inhabit that land. It is further alleged that this constitutes "pollution, impairment or destruction," which is defined as

[a]ny conduct by any person which violates, or is likely to violate, any environmental quality standard, limitation, regulation, rule, order, license, stipulation agreement, or permit of the state or any instrumentality, agency, or political subdivision thereof which was issued prior to the date the alleged violation occurred or is likely to occur . . . .<sup>115</sup>

The plaintiff has requested a temporary injunction prohibiting the immediate use of DDT by the defendant, and is seeking, in addition, a permanent injunction and damages.

### 1. *Motion to Dismiss*

Initially, the defendant corporation would probably move for a dismissal, relying on that part of Section 116B.03(1) which provides that

no action shall be allowable under this section for conduct taken by a person pursuant to any environmental quality standard . . . or permit issued by the pollution control agency, department of natural resources, department of health or department of agriculture.

The contention would be that no action can be maintained under the authority of Section 116B.03 since the conduct at issue is governed by an environmental quality permit issued by the Department of Agriculture.

However, the provision in question requires that the conduct be *pursuant* to such permit, not merely governed by it. The legislative history shows that this provision was intended to protect, to some degree,<sup>116</sup> reliance upon and compliance with such standards and permits. Only if the defendant can prove that there has been no violation of the permit would a dismissal at this point be proper. This would require a showing

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115. MINN. STAT. § 116B.02(5) (1971).

116. The reason this provision provides only partial protection is that the standard or permit can be challenged as inadequate to protect the environment by an action brought under the authority of Section 116B.10 of the Rights Act. In addition, Section 116B.10(3) permits the court to grant temporary relief; even though compliance with an environmental standard issued by the four specified agencies is a complete defense to actions brought under Section 116B.03, the conduct could be temporarily enjoined in a Section 116B.10 proceeding. For additional discussion of this, see Part III D4(b) *infra*.

by the defendant that he was entitled to a summary judgment.<sup>117</sup> The provision in question is not a bar to suits contesting whether the conduct at issue is in compliance with an environmental quality permit of one of the four specified agencies. It will, however, protect to some extent<sup>118</sup> a defendant who can sufficiently demonstrate that his conduct is in compliance with such a permit from actions where it is alleged that his conduct "materially adversely affects"<sup>119</sup> some natural resource, even if the allegation is true.

## 2. Remittance

The next pre-trial issue is whether the case should be remitted to an administrative proceeding within the Department of Agriculture. This issue is controlled by Section 116B.08(1), which provides that

[i]f administrative, licensing, or other similar proceedings are required to determine the legality of the defendants' conduct, the court shall remit the parties to such proceedings. [Emphasis added.]

If such proceedings are only "available," the court "may" remit.<sup>120</sup>

### a. "Required" or "Available"

The immediate question is by what standards a court should decide whether the administrative proceedings are "required" or only "available." Such proceedings could conceivably be "required" by due process, statutes, internal agency rules or some combination of these. Inasmuch as the statute itself provides no clue, the purposes behind Section 116B.08 must be looked to for enlightenment. Although one of the central purposes underlying statutes such as the Rights Act is to increase the power of the courts in the area of environmental protection,<sup>121</sup> Section 116B.08 is a limitation on that purpose and

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117. Minn. Rules Civ. P., Rule 56.03 would require that the defendant prove "there is no genuine issue as to any material fact and that . . . [he] is entitled to a judgment as a matter of law."

118. See note 116 *supra*.

119. MINN. STAT. § 116B.02(5) (1971).

120. *Id.* at § 116B.08(1).

121. See J. SAX, *DEFENDING THE ENVIRONMENT* (1970). Professor Sax sets forth a number of reasons for increasing the role of the courts in the area of environmental disputes. *Id.* at 108-24. First, as compared with governmental departments and administrative agencies, the courts are "outsiders." *Id.* at 108. The courts are less amenable to political pressures than agencies. In addition, while the selection of

contemplates coordination between courts and agencies. It is suggested that this coordination can best be effected in the following manner. Remittance would be "required" where the gist of the action is an alleged violation of an environmental quality standard, regulation or permit if the agency which issued it would be required—by due process or statute—to hold a hearing before it could take affirmative action itself for a violation of that standard, regulation or permit. In any other situation, remittance would be deemed "available."

The instant hypothetical would be a case of mandatory remittance under this scheme, since the Department of Agriculture would be required by statute to hold a hearing before revoking the permit granted to Corporation X.<sup>122</sup> This is a determination of the past or present legality of the conduct at issue. An example of nonmandatory remittance would be where there is no environmental standard regulation or permit applicable to the type of conduct at issue and where the defendant is accused of "materially adversely"<sup>123</sup> affecting the environment. The court could remit the case to an agency which has the power to promulgate standards or regulations encompassing the type of conduct at issue, and this would, in effect, be calling for a determination by the agency of the future legality of the type of conduct at issue.<sup>124</sup>

#### b. Criteria for Non-Mandatory Remittance

In cases where the court concludes that remittance is not

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members of administrative bodies which deal with environmental matters is based, at least in part, on the reactions of various pressure groups towards the candidates, the same does not hold true for the selection of most judges. Because such a small part of any one judge's time will be spent on environmental cases, the appointment of judges will not be based on their attitudes towards environmental protection. Second, because no judge will deal exclusively with environmental cases, there will be less pressure to strike some kind of balance between the various parties that are involved in such cases. *Id.* at 109-10. Third, the judicial process provides private citizens a chance to initiate actions to protect the environment, not merely to participate in agency hearings. *Id.* at 110-11. Finally, enlarging the sphere of judicial activity in this area does not entail restricting the activities of other institutions which are or may be established to protect the environment. *Id.* at 113.

122. MINN. STAT. § 18.036(2) (1969).

123. MINN. STAT. § 116B.02(5) (1971).

124. Under the Administrative Procedure Act's classification, this would be a proceeding for the adoption of a "rule" while the previously mentioned proceedings would be "contested cases." See MINN. STAT. § 15.0411(3) & (4) (1969).



required it must be determined by what criteria a court should decide whether to remit. The statute provides no indication of how a court should do this. It is therefore suggested that, since this situation is the same as the one a court faces when passing on questions of primary jurisdiction,<sup>125</sup> the same policy considerations which are used to resolve that issue should be applied here. Where remitting to an administrative agency will take advantage of some particular expertise of that agency and help attain uniformity of application of regulatory statutes, a court should remit.<sup>126</sup> In practice, there will be few cases which are not remitted.

### 3. *Temporary Injunctions*

A request for a temporary injunction may be governed by either Section 116B.07 or Section 116B.08(1), depending upon whether the case is remitted. If it is remitted, Section 116B.08(1) controls, while if it is not, Section 116B.07 governs the request. Section 116B.07 is the general provision for remedies in actions brought under Section 116B.03. It provides that the court may grant temporary equitable relief and that in such a case "it may require the plaintiff to post a bond sufficient to indemnify the defendant for damages suffered because of the temporary relief, if permanent relief is not granted." There is no requirement that the plaintiff show that an irreparable injury will occur if the temporary injunction is not granted. In contrast, Section 116B.08(1) provides that where the case is remitted "the court may grant temporary equitable relief where appropriate to prevent irreparable injury" to natural resources in the state. There is no provision here for the posting of a bond or other security.

The issues which arise from these two sections with respect to granting temporary injunctions are: (1) Is there a need to show that an irreparable injury will occur unless a temporary injunction is granted before such relief can be granted under Section 116B.07; and (2) Can the court impose a requirement that a plaintiff post security before granting a temporary injunction under Section 116B.08(1)? The answer to the first question is probably no while the answer to the second is yes.

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125. See 2 F. COOPER, *STATE ADMINISTRATIVE LAW* 561-72 (1965); 3 K. DAVIS, *ADMINISTRATIVE LAW TREATISE* § 19.01 (1958).

126. See *State ex rel. Sholes v. University of Minnesota*, 236 Minn. 452, 54 N.W.2d 122 (1952); 2 F. COOPER, *supra* note 125, at 563; 3 K. DAVIS, *supra* note 125, § 19.01 at 5.

There are three reasons why, in cases which are not remitted, there should be no requirement that the plaintiff prove that an irreparable injury will occur before a temporary injunction can be granted. First, Minnesota case law, while employing the phrase "irreparable injury," has considerably qualified its meaning. The evidence needed to sustain such a showing was expressly relaxed over 65 years ago by the Minnesota Supreme Court.<sup>127</sup> Since then, it has been held that, where a barn located in a city gave off noxious odors and where the damage to nearby property owners was hard to measure, the injury was irreparable.<sup>128</sup> "Irreparable injury" has also been defined at various times as a "real and serious injury,"<sup>129</sup> and recently, in a case involving an appeal from a temporary injunction rather than the issuance of one,<sup>130</sup> the Minnesota Supreme Court, in refusing to revoke the injunction, stated:

It is questionable whether our failure to further restrain the conciliator would result in any injury which is literally "irreparable." There is, however, a very great likelihood such injury might be real and substantial.<sup>131</sup>

Second, Minnesota Rules of Civil Procedure 65.01 and 65.02 strongly suggest that, except in one situation, there is no statutory requirement of an "irreparable injury." Until 1968, when these rules became effective, the issuance of temporary injunctions was controlled by Chapter 585 of the statutes. There was no mention in that chapter of the phrase "irreparable injury." It is, however, part of Minnesota Rule of Civil Procedure 65.01, and Rule 65 supersedes Chapter 585 to the extent inconsistent.<sup>132</sup> Rule 65.01 requires a showing of irreparable injury before a temporary injunction can be issued without first giving written or oral notice to the adverse party. But, Rule 65.02, which controls the issuance of temporary injunctions in all other situations, does not refer to such a showing.

Finally, in order to obtain a temporary injunction under

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127. *Bilsborrow v. Pierce*, 101 Minn. 271, 276-77, 112 N.W. 274, 276 (1907); *Whittaker v. Stangvick*, 100 Minn. 386, 392, 111 N.W. 295, 297 (1907).

128. *Lead v. Inch*, 116 Minn. 467, 473-74, 134 N.W. 218, 220 (1912).

129. *Thomas v. Ramberg*, 240 Minn. 1, 5, 60 N.W.2d 18, 20 (1953); *City of Jordan v. Leonard*, 119 Minn. 162, 164, 137 N.W. 740, 741 (1912). See also Note, *Developments in the Law—Injunctions*, 78 HARV. L. REV. 994, 1001-04 (1965).

130. *Minneapolis Fed'n of Teachers v. Obermeyer*, 275 Minn. 46, 144 N.W.2d 789 (1966).

131. *Id.* at 49, 144 N.W.2d at 791.

132. 3 J. HETLAND & O. ADAMSON, MINNESOTA PRACTICE 101 (1970).

the Rights Act in cases where the court remits the parties to an administrative proceeding, a showing of an irreparable injury is required. Both Section 116B.08(1) and Section 116B.10(3) state that where the court remits, it "may grant temporary equitable relief where appropriate to prevent irreparable injury to the air, water, land, or other natural resources located within the state." In contrast, Section 116B.07 has no such requirement. This certainly suggests that such a showing is only required under the Rights Act where a case is remitted. Such a system is also quite logical from a policy standpoint. If a case is remitted, it will take considerably longer for a final decision to be rendered by the court than if there is no remittance. This delay increases the possible harm which a defendant might suffer as a result of the injunction and justifies the requirement of a stronger showing before a temporary injunction is issued.

The second issue raised is whether a court can require the posting of security before granting a temporary injunction. Since many potential plaintiffs under the Rights Act could find it impossible to post such security,<sup>133</sup> the issue is a significant one. However, there are two reasons why there is virtually no chance that such a requirement would be held inapplicable to cases controlled by Section 116B.08(1). First, Section 116B.07 specifically provides that the court "may require the plaintiff to post a bond." There is nothing in Section 116B.08(1) which in any way qualifies this. Second, even though the Rights Act apparently gives the court discretion as to whether to require security, such an interpretation would conflict with and probably be overruled by Minnesota Rule of Civil Procedure 65.03(1), which provides:

No temporary restraining order or temporary injunction shall be granted except upon the giving of security by the applicant, in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained.

Even before the adoption of Rule 65.03, when Section 585.04 completely controlled the question of security for a temporary

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133. Minnesota law limits the recovery of damages caused by a temporary injunction to the amount of the security which the court ordered posted. MINN. RULES CIV. P., Rule 65.03(1). See *Northwest Hotel Corp. v. Henderson*, 257 Minn. 87, 90, 100 N.W.2d 493, 496 (1959); *Bellows v. Ericson*, 233 Minn. 320, 328, 46 N.W.2d 654, 660 (1951). Because of this and because the subject of many temporary injunctions will be large businesses, the amount of the required security could be above the means of many plaintiffs.

injunction, the Minnesota Supreme Court uniformly held that such security was mandatory.<sup>134</sup>

#### 4. *Trial, Burden of Proof and Defenses*

Assuming for the moment that the instant hypothetical case is not remitted, it would then advance to trial. The burden of proof and, possibly, the question of which defenses are available would be governed by the first paragraph of Section 116B.04, which provides:

In any action maintained under section [116B.03], where the subject of the action is conduct governed by any environmental quality standard . . . or permit promulgated or issued by the pollution control agency, department of natural resources, department of health, or department of agriculture, whenever the plaintiff shall have made a prima facie showing that the conduct of the defendant violates or is likely to violate said environmental quality standard . . . or permit, the defendant may rebut the prima facie showing by the submission of evidence to the contrary.<sup>135</sup>

The burden of proof issue is essentially the same here as in actions controlled by the second paragraph of Section 116B.04,<sup>136</sup> but there is a difference between these paragraphs with respect to which defenses are available. In actions controlled by the second paragraph, it is clear that at least the specified affirmative defense is available.<sup>137</sup> On the other hand, there are no defenses mentioned in the first paragraph, and furthermore, the language of the second paragraph seems to preclude the possibility of the specified affirmative defense being applicable to cases controlled by the first paragraph.<sup>138</sup> This could be interpreted to mean that there are no defenses and that the only course open to a defendant in a case governed by the first paragraph is to prove that there has been no violation of the

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134. See cases cited in note 133 *supra*.

135. There is, however, a qualification of this in the same paragraph to the effect that, where the environmental quality standards, limitations or permits of any of the aforementioned agencies are inconsistent or conflict, the most stringent shall control.

This provision could itself conflict with the provision in Section 116B.03(1), which provides that compliance with an environmental quality standard of one of the four specified agencies is a defense. Where there are two applicable standards, the most stringent would probably have to be complied with in order to utilize that defense.

136. See Part III B2(b) *supra*.

137. See Part III B2(c) *supra*.

138. The second paragraph begins by stating "In any other action maintained under section 3 . . ." MINN. STAT. § 116B.04 (1971). This strongly implies that what follows, including the specified affirmative defense, does not apply to the first paragraph.

standard or permit. However, since there is no mention in the first paragraph of any defense, it could be argued that any defenses available in a similar action not maintained under Section 116B.03 are available here.<sup>139</sup>

#### 5. *Retention of Jurisdictional Following Remittance*

If the case is remitted, the court retains jurisdiction pending completion of the administrative proceedings. This is true whether it is a case of mandatory or discretionary remittance.<sup>140</sup> In this respect, Section 116B.08 differs considerably from the procedure usually followed where a court is faced with a primary jurisdiction question. In such a situation, the court has discretion to dismiss once it determines that an administrative agency or governmental department should initially proceed.<sup>141</sup>

After the administrative proceedings have been completed, Section 116B.08(2) specifies that the court

shall adjudicate the impact of the defendants' conduct, program, or product on the air, water, land or other natural resources located within the state in accordance with the preceding sections [116B.02] through [116B.07].

In addition, Subdivision 2 provides that "in such adjudication, the court may order that additional evidence be taken to the extent necessary to protect the rights recognized in this act."

##### a. Relationship Between Subdivision 2 and Subdivision 3 of Section 116B.08

According to Subdivision 2, the court is supposed to "adjudicate the impact of the defendants' conduct . . . in accordance with the preceding sections 2 through 7." Since all of those sections relate to civil actions, Subdivision (2) may be read as a directive to the court to continue the civil action and not merely to review the agency determination once the case is returned from the agency. On the other hand, Subdivision 3 states:

Where, as to any such administrative, licensing, or other similar proceedings referred to above, judicial review thereof

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139. Examples of defenses which may be available in actions brought for the violation of environmental quality standards or permits issued by one of the four specified agencies include: (1) that the standard or permit amounts to a taking; (2) that, as applied to the defendant, it is unreasonable or arbitrary; and (3) that the defendant, for a variety of reasons, is entitled to a variance.

140. MINN. STAT. § 116B.08(1) (1971).

141. See 3 K. DAVIS, *supra* note 125, § 19.01, at 9-10.

is available, notwithstanding any other provisions of law to the contrary, the court originally taking jurisdiction shall maintain jurisdiction for purposes of judicial review.

This subdivision obviously does not refer to a continuation of the civil action, but rather to review of the agency determination of the legality of the conduct at issue.

One thing these subdivisions make clear is that the review of the agency decision concerning the legality of the defendant's conduct and the adjudication of the impact which such conduct will have on the environment are two *separate* judicial functions. The question which arises is how these two subdivisions can be interpreted so that a workable system is formed. It is suggested that this problem should be analyzed from the perspective of the three basic types of actions which could be involved in remittance under Section 116B.08: (1) cases where the conduct at issue is alleged to be in violation of an environmental quality standard or permit of one of the four specified agencies;<sup>142</sup> (2) cases where an environmental quality standard or permit of any other agency is alleged to have been violated;<sup>143</sup> and (3) cases where the conduct at issue is alleged to be "materially adversely" affecting the environment.<sup>144</sup>

In actions brought for violation of an environmental quality standard or permit issued by one of the four specified agencies:

- (1) The agency to which the case is remitted could determine that the standard or permit is being violated by the conduct at issue. If so, the defendant would most likely appeal that decision.<sup>145</sup>
  - (a) If the court affirms the agency's decision, it must find that the conduct at issue constitutes "pollution, impairment or destruction" of the environment.<sup>146</sup>
  - (b) If the court reverses the agency's decision, it must dismiss since no action can be maintained under Section 116B.03 of the Rights Act where the conduct at issue is found to be pursuant to an environmental

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142. See MINN. STAT. § 116B.02(5) (1971).

143. *Id.*

144. *Id.*

145. If there is no appeal of that decision, then the court would be likely to adopt the decision of the agency, thereby necessitating a finding that the conduct at issue constitutes pollution, impairment or destruction of the environment under Section 116B.02(5) of the Rights Act.

146. MINN. STAT. § 116B.02(5) (1971).

quality standard or permit of one of the four specified agencies.<sup>147</sup>

In light of these two alternatives there would be no point to literally "adjudicate the impact of the defendants' conduct" on the environment "in accordance with the preceding section 2 through 7."<sup>148</sup> If there is found to be no violation, the suit is dismissed. While if a violation is found, the only steps remaining to the court are to determine if there is any defense which might excuse the violation and, if not, what relief will be granted.

- (2) Alternatively, the agency to which the case is remitted could decide that the standard or permit has not been violated.
  - (a) This gives rise to the exact same possible series of events and outcomes as are set out above, with the exception that the plaintiff rather than the defendant will be the party appealing the agency decision.
  - (b) In a case where the defendant appeals, the judicial review would be governed by the Administrative Procedure Act (APA)<sup>149</sup> since the Rights Act does not speak to the procedure by which such an appeal can be effected. The same would hold true for a plaintiff who appeals, if such plaintiffs are held to be "ag-

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147. *Id.* at § 116B.03(1).

148. *Id.* at § 116B.08(2).

149. MINN. STAT. §§ 15.0411-.0426 (1969). The defendant can clearly get judicial review of an adverse agency decision in a case remitted under Section 116B.08 of the Rights Act whether the agency proceeding involves a "contested case" or the adoption of a "rule." Section 15.0411(4) of the APA defines a "contested case" as "a proceeding before an agency in which the legal rights, duties, or privileges of specific parties are required by law or constitutional right to be determined after an agency hearing." It is reasonably certain that, where a defendant is charged with violating an environmental quality standard or permit, there is a "contested case." By virtue of the adverse decision, the defendant is an "aggrieved" person within the meaning of Section 15.0424(1) and could therefore obtain judicial review under that section.

If it were determined that an agency proceeding, in a case remitted under Section 116B.08, involved a rule-making proceeding, a defendant who received what was considered an adverse decision could probably obtain judicial review under Section 15.0416 of the APA.

Section 15.0425(1) of the APA provides for judicial review of such agency proceedings for "[a]ny person aggrieved by a final decision in a contested case . . . ." And the defendant would most definitely be an "aggrieved" person. The scope of judicial review in such an appeal would be governed by Section 15.0425 of the APA.

grieved" persons under the APA.<sup>150</sup> It is very likely that the courts will hold that plaintiffs appealing from an adverse agency decision rendered after a case is remitted are "aggrieved" persons.<sup>151</sup>

In actions brought for violation of an environmental quality standard or permit issued by an agency other than one of the four specified ones:

- (1) The agency to which the case is remitted could determine that the standard or permit has been violated. If so, the defendant would most likely appeal that decision.<sup>152</sup>
  - (a) If the court affirms the agency's decision, it must find that the conduct at issue constitutes "pollution, impairment or destruction" of the environment because an environmental quality standard has been violated.<sup>153</sup>
  - (b) If the court reverses the agency's decision, it would not automatically dismiss, since compliance with environmental quality standards or permits, other than ones issued by one of the four specified agencies, is not a defense under the Rights Act.

It is asserted that in both of the above situations, the court must proceed to "adjudicate the impact of the defendants' conduct" on the environment in accordance with Sections 116B.02 through 116B.07 of the Act.<sup>154</sup> If the court affirms the agency's decision, the defendant may well appeal to the Minnesota Supreme Court.<sup>155</sup> In case the district court decision is reversed by the supreme court, the fact that the supreme court might ultimately find the defendant to be in compliance with the standard or permit would not preclude a decision prohibiting the conduct at issue, for compliance with such a standard is not a defense. If the impact of the defendant's conduct had not been adjudicated below, the supreme court would have to remand to the district

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150. MINN. STAT. § 15.0424(1) (1969).

151. There are several reasons why a plaintiff receiving an adverse agency decision in such a case should be considered an "aggrieved" person. First, Section 116B.01 of the Rights Act states that "each person is entitled by right" to the protection of the environment. Second, in order to implement that right, Section 116B.03(1) of the Rights Act permits any person to maintain a civil action against any other person. Finally, the agency decision, if wrong, will have an adverse affect on the environment.

152. See note 145 *supra*.

153. MINN. STAT. § 116B.02(5) (1971).

154. *Id.* at § 116B.08(2).

155. MINN. STAT. § 15.0426 (1969).



court for further proceedings. This remand could be avoided by requiring the district court to originally perform that adjudication.

If the district court reverses the agency's decision and finds there has been no violation, it must still adjudicate the impact of the conduct at issue. This is a situation where, at least as it involves the defendant, even if an environmental quality standard or permit is being complied with, the court can prohibit the conduct at issue.<sup>156</sup> The court would probably base its decision on whether the conduct "materially adversely affects" the environment.<sup>157</sup>

- (2) The agency to which the case is remitted could determine that the standard or permit has not been violated. This would give rise to the exact same possible series of events and outcomes as are set out above, with the exception that the plaintiff, rather than the defendant, would be the one which appeals the agency decision.

Finally, there are cases where the conduct at issue is alleged to be "materially adversely" affecting the environment,<sup>158</sup> and there is no standard or permit which can be said to have been violated.<sup>159</sup> However, the court could remit in order to allow an agency which has the power the chance to promulgate an environmental quality standard. If the agency declines to do so, the court would simply continue the original civil action.<sup>160</sup> If the agency adopts a new standard, either the de-

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156. This procedure allows a plaintiff under the Rights Act to challenge the adequacy of an environmental quality standard or permit other than one issued by one of the four specified agencies; but this challenge involves only one person. Only the actual defendant is directly affected, although others may change their conduct as a result of such a decision. There is, however, no apparent way to challenge the adequacy of a standard per se under the Rights Act except in actions brought under Section 116B.10, which are limited to suits against state units of government or where Section 116B.09 is available.

157. MINN. STAT. § 116B.02(5) (1971).

158. *Id.*

159. This must be qualified in a case where there is no allegation that an environmental quality standard or permit has been violated but there is one which may have been.

160. The only possible exception would arise if one of the parties appealed this refusal to issue a standard. The type of agency proceeding, which would take place in a case where the court remits to give an agency the opportunity to make a standard, would be very similar to that which is contemplated in Section 15.0415 of the APA. That section governs petitions for the adoption of rules. The appeal would probably have to be a mandamus action. See Baird, *Judicial Review of Administrative Procedures in Minnesota*, 46 MINN. L. REV. 451, 458-59 (1962).

fendant or the plaintiff will be likely to appeal, depending upon the stringency of the standard.

If the defendant were to appeal, the APA would govern the action.<sup>161</sup> The plaintiff, on the other hand, may have a choice. If a state agency is involved, the standard could be challenged under Section 116B.10 of the Rights Act.<sup>162</sup> If not, the plaintiff could also appeal the new standard by way of the APA.<sup>163</sup>

If, for whatever reason, no standard is adopted, the court will then adjudicate in accordance with Sections 116B.02 through 116B.07. On the other hand, if one is adopted, the agency would probably also make a determination as to whether the conduct at issue violates it. Should the court ultimately find that the conduct is in compliance with the new environmental quality standard, one of two things would occur. If the agency which issued the standard is one of the four specified ones, the court must dismiss. If some other agency is involved, the court must adjudicate the impact of the defendant's conduct on the environment.

Alternatively, if the court ultimately determines that the conduct violates the new standard, it must find that the conduct constitutes "pollution, impairment or destruction" no matter what agency issued the standard. However, if the agency is not one of the four specified ones, the court should go on to adjudicate the impact of the conduct. In the event that the district court is reversed on the issue of whether the standard was violated, the conclusions reached by the court in adjudicating the impact of the conduct might not be reversed and would support the relief awarded to the plaintiff.

#### b. Operation of Subdivision 2 of Section 116B.08

Whenever the court remits and later proceeds to adjudicate the impact of the defendant's conduct in accordance with Sections 116B.02 through 116B.07,<sup>164</sup> Subdivision 2 permits the court to "order that additional evidence be taken to the extent necessary to protect the rights recognized in this act." One section which may be difficult to comply with literally is Section 116B.04. Since Section 116B.08(2) will not really come into

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161. MINN. STAT. §§ 15.0416, 15.0417 (1969).

162. See Part III D *infra*.

163. See note 179 *infra*.

164. MINN. STAT. § 116B.08(2) (1971).

focus in cases involving violations of environmental quality standards issued by one of the four specified agencies,<sup>165</sup> only the second paragraph of Section 116B.04 is relevant here. It requires the plaintiff to establish a *prima facie* showing that

the conduct of the defendant has, or is likely to cause the pollution, impairment, or destruction of . . . natural resources located within the state.

If this provision were literally complied with, the court would waste considerable time and effort since, presumably, much of the evidence necessary to satisfy this requirement has already been presented during the agency proceedings.

However, the problem is easily resolved by reading the provision giving the court discretion as to what additional evidence is required as controlling the submission of evidence by the plaintiff, as well as the defendant, with respect to Section 116B.04. This provision also serves another purpose. It ensures that the court is never restricted to the record submitted by the agency. This in turn should contribute to the willingness of courts to remit in cases where it is discretionary. The courts gain the benefit of the agency's fact finding expertise, save time in the process, and are still free to take any additional evidence which is deemed necessary.<sup>166</sup>

## 6. Relief

The plaintiff in the instant hypothetical has requested damages for the harm already caused by the defendant's alleged misuse of DDT, as well as a permanent injunction to prevent any further use of DDT by the defendant. Since Section 116B.07 specifically permits the court to grant permanent equitable relief, there is no doubt that a permanent injunction is an available remedy. However, the same cannot be said for the damages remedy. If read alone, that issue seems to be left open by Section 116B.12, which states:

No existing civil or criminal remedy for any wrongful action shall be excluded or impaired by this act. The rights and remedies provided herein shall be in addition to any administrative, regulatory, statutory, or common law rights and remedies now or hereafter available.

But there are several reasons for concluding that damages are not available as a remedy in civil actions maintained under

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165. See text following note 144 *supra*.

166. The fact that the court which remits a case retains jurisdiction under Section 116B.08(3) should also contribute to the willingness of courts to remit where such is discretionary.

the Rights Act. First, the legislative history of the Act directly contradicts any such notion. The drafters of the original bill introduced into the 1971 legislative session intentionally omitted reference to a damage remedy only after considerable debate.<sup>167</sup> During the 1971 legislative session an amendment was defeated which would have added such a remedy.<sup>168</sup> Furthermore, the bill which eventually became the Rights Act was generally viewed, both by the legislature and the public, as a tool to prevent further harm to the environment, not as a way to punish persons for harm already done to natural resources in the state.<sup>169</sup>

Second, the language in the Rights Act which specifically focuses on relief only mentions declaratory and equitable relief. Section 116B.03(1), which controls the procedure for initiating a civil action to enjoin pollution and enforce environmental quality standards or permits, states that such an action can be maintained "for declaratory or equitable relief." In addition, Section 116B.07, which is the general provision governing relief in such cases, does not appear to encompass such a remedy. That section states, in part, that

[t]he court may grant declaratory relief, temporary and permanent equitable relief, or may impose such conditions upon a party as are necessary or appropriate to protect . . . natural resources located within the state . . . .

The latter part of this provision, permitting the imposition of "necessary or appropriate" conditions, could arguably be read to encompass a damage award if a court concluded such was "necessary or appropriate to protect" the environment. However, the preferable interpretation, especially in light of the legislative history of the Rights Act, would seem to be that this language was intended to modify only the preceding forms of relief, ensuring that the courts have maximum flexibility to mold effective remedies.<sup>170</sup>

Finally, there are two policy reasons why, if there is any doubt concerning the availability of a damage remedy, the

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167. See text following note 17 *supra*.

168. See text accompanying and following note 35 *supra*.

169. Interview with Rep. Rolf Nelson, member of the House Judiciary Committee, in Minneapolis, Minnesota, Aug. 23, 1971.

170. Additional support for the proposition that a damage remedy is not available is contained in Section 116B.10(1), which controls the initiation of civil actions against state agencies for issuance of environmental quality standards or permits which are allegedly inadequate to protect the environment. As is the case in Section 116B.03(1), such actions can only be maintained "for declaratory or equitable relief."

courts should decide the question against the inclusion of that remedy. First, if courts are permitted to assess damages they might refrain from also giving injunctive relief to protect the environment.<sup>171</sup> Second, if there really is a danger that frivolous suits will be brought in excessive number under the Rights Act, as some critics have claimed,<sup>172</sup> the availability of a damage award would only increase this problem.

#### D. USE OF THE RIGHTS ACT TO CONTEST AN AGENCY ACTION

The Minnesota Pollution Control Agency (PCA) recently completed hearings to establish a new standard for the sulfur content of discharges into the air from industrial sources. Subsequently, the PCA adopted a somewhat stricter standard than the one previously in force. Company X, which discharges sulfur into the air as a by-product of its manufacturing process, had testified in favor of retaining the old standard and has decided to appeal the agency's decision. A conservation group has also decided to contest the decision, on the ground that the new standard is not strict enough.

##### 1. *Methods of Review*

In the past, judicial review of an agency decision such as the one set out above could be obtained by various methods, including extraordinary writs, equitable actions, suits for damages and simply defending an agency's suit to enforce its decision.<sup>173</sup> However, today, because of the increasing importance of administrative agencies, as exemplified by the enactment of the APA, and because writs which were formerly classed as extraordinary<sup>174</sup> are now mainly controlled by statutes,<sup>175</sup> the

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171. See *Boomer v. Atlantic Cement Co.*, 309 N.Y.S.2d 312 (1970). This would be a possibility especially where the defendant is a large employer and an injunction might result in the loss of a number of jobs.

172. The Minnesota Association of Commerce and Industry voiced this concern during the House Judiciary Subcommittee meetings in February of 1971. Interview with Richard N. Flint, chairman of the Environmental Law Subcommittee of the Minnesota Bar Association, in Minneapolis, Minnesota, Sept. 9, 1971.

173. See generally Risenfeld, Bauman & Maxwell, *Judicial Control of Administrative Action by Means of the Extraordinary Remedies in Minnesota* (pts. 1 & 2), 33 MINN. L. REV. 569, 685 (1949) [The same authors have a sequel to these articles in 36 MINN. L. REV. 435 (1952)].

174. As used in connection with obtaining judicial review of administrative actions, extraordinary writs generally include certiorari, declaratory judgment, injunction, mandamus, prohibition and quo warranto. *Id.*

175. These extraordinary writs are now governed by the following

methods for obtaining review of an agency decision like this one are generally statutory. In the instant hypothetical case, the use of extraordinary writs to obtain judicial review are probably precluded.<sup>176</sup> In any event, this section will concentrate on the use of the APA and the Rights Act to obtain judicial review of the agency's decision.

#### a. Judicial Review under the APA

The APA provides two possible methods of judicial review in this case. First, a declaratory judgment action could be brought to determine the validity of the rule which the PCA adopted.<sup>177</sup> The main problem with this method from the point

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statutes: (1) certiorari, MINN. STAT. §§ 606.01-.05 (1969); (2) declaratory judgment, MINN. RULES CIV. P., Rule 57; (3) injunction, MINN. STAT. §§ 585.01-.04 (1969); (4) mandamus, MINN. STAT. §§ 586.01-.06 (1969); (5) prohibition, MINN. STAT. §§ 587.01-.05 (1969); and (6) quo warranto, MINN. RULES CIV. P., Rule 81.01(2).

176. See *Waters v. Putnam*, 289 Minn. 165, 183 N.W.2d 545 (1971). In that case, a group of landowners appealed the quashing by the district court of their petition for a writ of certiorari and applied, in the alternative, for a writ of mandamus to review an order of the Water Resources Board which had established a new watershed district. The court held that although Section 15.0424 of the APA provided for judicial review of the agency's decision, that method of review was lost because the 30-day appeal period had run before filing with the district court. The court went on to say that "since a right of appeal was accorded under the Administrative Procedure Act, the district court was without jurisdiction to consider the matter on certiorari." *Id.* at 169, 183 N.W.2d at 549. In addition, it was stated that "[t]he possibility of a statutory appeal from an administrative action would ordinarily seem to preclude resort to mandamus." *Id.* at 172, 183 N.W.2d at 550.

In light of these statements, the decision in *Waters* could be read as precluding the use of extraordinary remedies in a case such as the instant hypothetical. However, the decision is weakened somewhat by the fact that the appeal period under the APA had already lapsed in *Waters*. With respect to its statements regarding the unavailability of both certiorari and mandamus, the court gave an alternative reason for its decision, stating that "[t]he right to appeal having lapsed, appellants cannot now do indirectly (by certiorari and mandamus) what they failed to do directly by appeal." *Id.* at 172, 183 N.W.2d at 550. In addition, the APA itself appears to conflict with the decision. The section of the APA of which the plaintiffs failed to make timely use states that "nothing in this section shall be deemed to prevent resort to other means of review, redress, relief, or trial de novo provided by law now or hereafter enacted." MINN. STAT. § 15.0424(1) (1969). Finally, *Waters* only involves the use of an extraordinary writ as a remedy within itself. It does not control the situation where a statute, such as the Rights Act, incorporates extraordinary remedies—declaratory and injunctive relief—as a means of providing redress for violation of its provisions. See also Part III D 1 (b) *infra*.

177. MINN. STAT. § 15.0416 (1969). To the extent that the decision

of view of a party appealing a new standard is that the scope of review is rather narrow.<sup>178</sup> In addition, it is possible that the conservation group may not have standing to bring this petition.<sup>179</sup> Second, it may be possible to use Section 15.0424 of the APA as a method of review. The scope of review for this section is not as restrictive as the one which applies to petitions for a declaratory judgment.<sup>180</sup> However, only a "contested case"<sup>181</sup> can be reviewed under Section 15.0424 while the instant hypothetical involves a rule-making proceeding.<sup>182</sup>

in *Waters* precludes the use of declaratory judgments, only declaratory judgments brought under Rule 57 would be affected. Nothing in *Waters* restricts the operation of the APA in any way. To the contrary, it makes an attempt to strengthen it.

178. MINN. STAT. § 15.0417 (1969) provides:

In proceedings under section 15.0416 the court shall declare the rule invalid if it finds that it violates constitutional provisions or exceeds the statutory authority of the agency or was adopted without compliance with statutory rule-making procedures.

179. Section 15.0416 of the APA is available "when it appears that the rule, or its threatened application, interferes with or impairs, or threatens to interfere with or impair the legal rights or privileges of the petitioner." (Emphasis added.)

It is possible that the conservation group could be held to have no "legal rights or privileges" within the meaning of this section that could be interfered with or threatened by the new standard. However, the Rights Act appears to have bestowed such rights, even if they did not already exist, by stating that "each person is entitled by right to the protection, preservation and enhancement of air, water, land and other natural resources located within the state . . . ." MINN. STAT. § 116B.01 (1971).

180. MINN. STAT. § 15.0425 (1969), which provides in part:

[T]he court may affirm the decision of the agency or remand the case for further proceedings; or it may reverse or modify the decision if the substantial rights of the petitioners may have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:

- (a) In violation of constitutional provisions; or
- (b) In excess of the statutory authority or jurisdiction of the agency; or
- (c) Made upon unlawful procedure; or
- (d) Affected by other error of law; or
- (e) Unsupported by substantial evidence in view of the entire record as submitted; or
- (f) Arbitrary or capricious.

The significant difference between the scope of review in § 15.0417 and in this section is contained in Subsection (e) above. It provides a party with an opportunity to challenge the basic soundness of the agency action, an opportunity not provided for in Section 15.0417.

181. This is defined by Section 15.0411(4) of the APA as:

a proceeding before an agency in which the legal rights, duties or privileges of specific parties are required by law or constitutional right to be determined after an agency hearing.

182. A "rule" is defined by Section 15.0411(3) as:

every regulation, including the amendment, suspension, or repeal thereof, adopted by an agency, whether with or without

b. Judicial Review under the Rights Act

Even though the APA could be used to obtain judicial review, both parties are likely to at least consider the feasibility of contesting the new standard under the authority of the Rights Act. The question which then arises is whether the existence of possible methods of obtaining judicial review under the APA precludes resort to methods contained in the Rights Act. This question appears to be resolved by Section 15.0424(1) of the APA, which governs judicial review in contested cases, and where it is stated that "nothing in this section shall" abrogate any existing or subsequent methods of review or remedies. Moreover, the Minnesota Supreme Court has stated that one statutory method of review is not foreclosed solely because another is available.<sup>183</sup> The only exception to this seems to be that where the APA provides methods of review, statutory methods which are codifications of common-law extraordinary remedies are not available for obtaining judicial review.<sup>184</sup>

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prior hearing, to implement or make specific the law enforced or administered by it or to govern its organization or procedure . . . .

183. *Bryan v. Community State Bank*, 285 Minn. 226, 172 N.W.2d 771 (1969). Mr. Bryan had applied for a certificate of authority to open a bank, which the Department of Commerce denied after holding hearings on the application pursuant to MINN. STAT. § 45.07 (1969). Although this section provides for review of such a denial by the supreme court by way of certiorari, this method of review was unavailable to Mr. Bryan because of procedural errors. He appealed the decision by way of Section 15.0424 of the APA. The district court remanded and the Department, after further consideration, reversed itself and granted the certificate. This decision was contested by the Community State Bank, which requested and was granted certiorari under MINN. STAT. § 45.07 (1969). The main issue was whether Mr. Bryan should have been restricted to the use of Section 45.07 in contesting the original decision by the Department denying the application for a certificate. The supreme court held that both Section 45.07 and Section 15.0424 were available to contest the decision even though one method had been lost through procedural error. *Id.* at 230, 172 N.W.2d 774. See also *Quinn Distributing Co., Inc. v. Quast Transfer, Inc.*, 288 Minn. 442, 181 N.W.2d 696 (1970); *Minneapolis Van and Warehouse Co. v. St. Paul Terminal Warehouse Co.*, 288 Minn. 294, 180 N.W.2d 175 (1970).

184. See note 176 *supra*. It appears, however, that this exception has its own exception. The decision in *Waters* strongly indicates that, where the APA is available and provides a method of review, extraordinary remedies such as certiorari and mandamus will be disallowed as methods of obtaining judicial review. *Bryan* seems to qualify this to the extent that such extraordinary remedies are incorporated into statutes other than the specific statute which controls such a remedy. See note 183 *supra*.



## 2. Sections 116B.09 and 116B.10, an Operational System

The only sections of the Rights Act which contain authority to directly challenge environmental quality standards and permits issued by various units of government in the state are Sections 116B.09 and 116B.10.<sup>185</sup> The former permits intervention into administrative proceedings or judicial review thereof which involve "conduct that has caused or is likely to cause pollution, impairment, or destruction" of the environment.<sup>186</sup> The latter authorizes actions for declaratory or equitable relief against state units of government which have issued environmental quality standards or permits which are allegedly inadequate to protect the environment.<sup>187</sup> Although these sections contain several ambiguous provisions, it is suggested that they can be read in a manner which permits a workable system to be formulated. In the following material, the more important aspects of such a system will be examined.

### a. What Agencies are Encompassed?

Section 116B.10(1) specifies that relief can only be obtained "against the state or any agency or instrumentality thereof." This limitation to state units of government was a result of a compromise which proponents of the Rights Act worked out with the Minnesota Association of Commerce and Industry and other groups opposed to the Act.<sup>188</sup> In exchange for allowing compliance with environmental quality rules and decisions of the four specified agencies to be a complete defense to civil actions brought under Section 116B.03, it was agreed that the Act would also contain a method for directly challenging such rules and decisions.<sup>189</sup> However, the scope of Section 116B.10 was not limited to just those four agencies but was extended to all state units of government. The actual benefit of this extension is, however, uncertain. The environmental quality standards and permits issued by the PCA and the Departments of Natural Resources, Health and Agriculture will probably be the focus of most actions brought under Section 116B.10 of the

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185. Section 116B.08(3) of the Rights Act provides an indirect way to challenge existing environmental quality standards or permits which are issued by agencies other than the four specified ones. See text following note 151 *supra*.

186. MINN. STAT. § 116B.09(1) (1971).

187. *Id.* at § 116B.10(1).

188. See text accompanying note 41 *supra*.

189. *Id.*

Rights Act, but there are other units of government which issue standards and permits which could be challenged under this section, including the Livestock Sanitary Board, the State Planning Board and the Water Resources Board.

Section 116B.09 is much less explicit regarding which units of government are subject to its provisions. The only provision which could be interpreted as directly referring to the types of agencies and other governmental units encompassed by Section 116B.09 is contained in Subdivision 1; it states that intervention is permitted into "any administrative, licensing, or other similar proceeding" as well as into actions for judicial review of such proceedings. While this could be interpreted as referring to the types of agencies and other governmental units encompassed by Section 116B.09, a more straightforward reading is that it relates to the types of actions into which intervention is authorized.<sup>190</sup> If the former interpretation is adopted, it is likely to be held that intervention is authorized into appropriate proceedings which involve either state, county or local units of government, since Section 116B.09 allows intervention in "any administrative, licensing, or other similar proceeding." (Emphasis added.) However, the result would probably be the same if the latter interpretation were adopted. Since there is no provision in Section 116B.09 which restricts it to state agencies and other units of state government, while there is in Section 116B.10, then, by implication, Section 116B.09 should be applicable to all three levels of government listed above. It is therefore suggested that, while Section 116B.09 should encompass governmental units at the state, county and local levels, the phrase in question should be interpreted as referring to the types of proceedings into which intervention is permitted.

b. What Types of Proceedings are Encompassed?

Section 116B.10(1) specifies that an action can be maintained if it is "a challenge to an environmental quality standard, limitation, regulation, rule, order, license, stipulation agreement or permit." This exact enumeration also appears in nine other places in the Act<sup>191</sup> and includes the end product of

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190. A third interpretation is that it refers to both. However, it seems highly unlikely that the legislature intended that the same phrase be used for these two different purposes.

191. It also appears twice in Sections 116B.02(5), 116B.03(5) and 116B.10(2), and once in Sections 116B.03(1), 116B.04 and 116B.10(3).

both "contested cases"<sup>192</sup> and proceedings for the adoption of "rules."<sup>193</sup> However, there is some question whether all actions challenging the adequacy of environmental quality standards and rules are encompassed by Section 116B.10. The source of this doubt is Subdivision 1, which states that Section 116B.10 is applicable to actions "for which the applicable statutory appeal period has elapsed." The APA, which controls the appeal of the PCA regulations and rules concerning air,<sup>194</sup> has no such appeal period for challenging "rules."<sup>195</sup> Although it could be held that actions challenging standards and rules for which there is no statutory appeal period are not within the scope of Section 116B.10, there are several reasons why the opposite result should be reached. First, the language itself does not compel such a result. It could be interpreted as restricting the operation of Section 116B.10, where there is a statutory appeal period until after that period has elapsed, but not restricting it at all if there is no such appeal period. Second, the application of the phrase in question to cases in which there are statutory appeal periods is remedial in nature; it allows agency actions to be challenged even after the normal statutory appeal period has run. It would be inconsistent to apply this phrase in a restrictive manner to cases which never had an appeal period in the first place. Third, the enumeration of the various agency decisions in Subdivision 1 is very inclusive. Finally, the purpose of this section was to allow direct challenges to standards, rules and permits issued by the four specified agencies.<sup>196</sup> This purpose would be largely defeated if actions by those agencies for which there is no statutory appeal period were excluded.

The only provision which could provide a basis for determining the types of actions to which Section 116B.09 is applicable is the one providing for intervention into "any administrative, licensing, or other similar proceeding." There are three ways in which this phrase could be interpreted. It could be read as including all administrative proceedings, including only contested cases, or as including only proceedings for the adoption of rules. To the extent that "licensing" is considered a

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192. See MINN. STAT. § 15.0411(4) (1969).

193. *Id.* at § 15.0411(3).

194. *Id.* at § 116.07(4).

195. See *id.* at §§ 15.0413, 15.0416.

196. See text accompanying note 41 *supra*.

contested case,<sup>197</sup> the latter choice of only rule-making proceedings can be eliminated. There are, however, arguments which support both of the other two choices.

There are two arguments which support the interpretation that only contested cases are encompassed by the phrase in question. First, it could be argued that if the intention of the legislature had been to include all administrative proceedings there would have been no reason to use "licensing" in addition to "any administrative" proceeding. In addition, if all such proceedings were intended to be encompassed by Section 116B.09, it is curious that the inclusive enumeration set forth in Section 116B.10(1) as well as in nine other places in the Act<sup>198</sup> was not employed. However, the better view is that the phrase in question does include both contested cases and proceedings for the adoption of rules. The language is at least open to this interpretation. Since "administrative" is modified by "any," it should be read to include all administrative proceedings irrespective of the language following those two words. In addition, the phrase in question is used in Section 116B.08(1) in a way that comprehends both types of administrative proceedings.<sup>199</sup> Finally, there are two reasons why it makes little sense, from a policy standpoint, to restrict the scope of Section 116B.09 to contested cases. First, rule-making proceedings generally result in decisions which have broader application than those which result from contested cases. Second, there will be many situations involving contested cases where, because the agency is opposing the request of some private party, no intervention may be necessary.

### c. When Are These Sections Available?

There appears to be no restriction in Section 116B.09 on what point in time intervention can be effected into administrative proceedings, but there is a restriction on intervention into pro-

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197. Licensing proceedings at the state, county and local levels are sometimes difficult to precisely categorize as "contested cases" or as rule-making proceedings. 2 F. COOPER, *supra* note 121, at 483-84. However, the Minnesota Supreme Court has indicated that in what might be considered borderline cases, it will treat the action as a "contested case." In one recent case, the supreme court stated that an appeal from an order of the Water Resources Board establishing a new watershed district "must be classified as a 'contested' case or proceeding . . . ." *Waters v. Putman*, 289 Minn. 165, 169, 183 N.W.2d 545, 548 (1971).

198. See note 191 *supra*.

199. See note 124 *supra*.

ceedings for judicial review thereof. Since it is impossible to intervene into an administrative proceeding which was over at the time the Rights Act was signed into law, and since Section 116B.09(1) only authorizes intervention into administrative proceedings or "judicial review thereof," it would appear that intervention under Section 116B.09 is restricted to judicial review of the results of administrative proceedings which were going on at the time the Rights Act became law or sometime thereafter. However, because intervenors under this section are accorded the status of a party,<sup>200</sup> the courts may well uphold some restrictions by agencies regarding when intervention can be effected into administrative proceedings. And the courts are virtually certain to impose some requirement of timeliness for intervention into judicial review of agency proceedings.<sup>201</sup>

The situation in the case of Section 116B.10 is somewhat different. Subdivision (1) of that section provides that it is available when "the applicable statutory appeal period has elapsed." There seem to be three possible interpretations of this. First, it could be read as restricting the operation of Section 116B.10 to those situations where the statutory appeal period had already elapsed at the time the Rights Act was signed into law. That reading, however, would largely defeat the purpose of this section, which is to provide for direct challenges to rules and decisions issued by the four specified agencies.<sup>202</sup> Second, it could also be interpreted as restricting Section 116B.10 to those actions which involve challenges to agency determinations for which there is an "applicable appeal period." However, for the reasons previously set forth,<sup>203</sup> it should be read as applying to all agency determinations in the following manner: (1) if the action has no statutory appeal period, Section 116B.10 should be available at any time;<sup>204</sup> and (2) if there is an appeal period, once it has elapsed, whether it already has or will do so in the future, Section 116B.10 is available.

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200. MINN. STAT. § 116B.09(1) (1971).

201. MINN. RULES CIV. P., Rule 24.01 states that even where intervention is by right, it must be timely.

202. See text accompanying note 41 *supra*.

203. See text following note 195 *supra*.

204. Under this interpretation there may be some difficult issues involving consolidation of actions. For example, a party could initiate an action under Section 116B.10 which challenges the adequacy of an environmental quality standard or permit which some defendant is being accused of violating in an action brought by a third party under Section 116B.03.

d. What is the Scope of Judicial Review?

Section 116B.10(2) provides that the plaintiff has the burden of establishing a *prima facie* showing<sup>205</sup> that the agency action being challenged is inadequate to protect the environment. If this is accomplished, the court must remit the case to the appropriate agency, which is required to prepare an order setting forth its position on the case. In addition, the court is directed to "retain jurisdiction for purposes of judicial review to determine whether the order of the agency is supported by the preponderance of the evidence."<sup>206</sup> But, the plaintiff still appears to have the overall burden of persuasion.

With respect to the review of an agency determination, this is a broader scope of review than that contained in the APA. The broadest scope of review provided for in the APA is contained in Section 15.0425(e) and is probably restricted to contested cases.<sup>207</sup> Under that provision, an agency determination can be reversed or modified if it is "[u]nsupported by substantial evidence in view of the entire record as submitted." This has been interpreted by the Minnesota Supreme Court as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."<sup>208</sup>

However, from another point of view, the preponderance of the evidence test is not so incongruous. Actions controlled

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205. See text accompanying notes 100-02 *supra*.

206. MINN. STAT. § 116B.10(3) (1971).

207. The structure of the APA indicates that "rules" are appealed under Section 15.0416 and that the scope of review for such appeals is governed by Section 15.0417. "Contested cases," on the other hand are appealed under Section 15.0424 while the scope of review in those cases is governed by Section 15.0425. However, there is nothing which absolutely precludes some parts of an action brought under Section 15.0416 from being reviewed according to Section 15.0425. The language in Section 15.0425 leaves open the possibility that some findings of fact involved in proceedings for the adoption of "rules" may fall within the scope of that section.

208. Minneapolis Van & Warehouse Co. v. St. Paul Terminal Warehouse Co., 288 Minn. 294, 299, 180 N.W.2d 175, 178 (1970); 4 K. DAVIS, *supra* note 125, at 118. This language was originally used by Chief Justice Hughes in Consolidated Edison Co. v. NLRB, 305 U.S. 197, 229 (1938). The leading case since that decision is Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951). It emphasizes that the substantial evidence test must be on the whole record, not just the evidence which supports the agency determination or finding. *Id.* at 477. This is reflected in the Minnesota APA in Section 15.0425(e), which requires the substantial evidence test to be applied "in view of the entire record submitted."

by Section 116B.10 are a combination of a civil action and judicial review of an agency decision. Subdivision (1) is entitled "Civil Actions," while Subdivision (3) is entitled, in part, "Judicial Review," and in Minnesota, the standard of evidence which must be met by the party bearing the burden of persuasion on an issue in a civil action is generally stated as "a fair preponderance of the evidence."<sup>200</sup> This has been defined as meaning that the evidence of the party bearing the burden of persuasion must "outweigh, . . . weigh more than . . . [or] overcome" the evidence of the adverse party.<sup>210</sup> It seems likely that no distinction will be made between the meaning of the "preponderance of the evidence" test and the "fair preponderance of the evidence" test.<sup>211</sup>

The purpose behind basing review of the agency's order on whether it is supported by a preponderance of the evidence rather than making the scope of review under the APA govern, was to provide a more rigorous review of such an order than would otherwise be available.<sup>212</sup> Although the total significance of this new scope of review is not clear, its impact will depend on three factors: (1) whether the standard is applied to "contested cases" or proceedings for the adoption of "rules;" (2) whether or not the reviewing court is restricted to the record submitted by the agency; and (3) the general attitude of the Minnesota courts towards environmental problems.

The scope of review set up by the "preponderance of the evidence" test will have a greater impact on actions brought to challenge the results of agency proceedings for the adoption of rules than on those challenging determinations reached in contested cases. The reason for this differential impact is that under the APA the scope of review for the former type of

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209. *Wick v. Widdell*, 276 Minn. 51, 53-54, 149 N.W.2d 20, 22 (1967); *Trimbo v. Minnesota Valley Natural Gas Co.*, 260 Minn. 386, 398, 110 N.W.2d 168, 176 (1961); *Carpenter v. Nelson*, 257 Minn. 424, 427-29, 101 N.W.2d 918, 921 (1960); *Village of Plummer v. Anchor Casualty Co.*, 240 Minn. 355, 356-57, 61 N.W.2d 225, 226 (1953).

210. *Aubin v. Duluth Street Ry. Co.*, 169 Minn. 342, 348, 211 N.W. 580, 583 (1926).

211. *But cf. Hogan v. Twin City Amusement Trust Estate*, 155 Minn. 199, 202, 193 N.W. 122, 123-24 (1923); *Lindsley v. Chicago, M. & St. P.R. Co.*, 36 Minn. 539, 543, 33 N.W. 7, 9 (1887). Early cases such as these, where the announced standard was the "preponderance of the evidence," suggest that the current "fair preponderance of the evidence" test may be somewhat different. However, it is not readily apparent what this difference may be.

212. Interview with Rep. Rolf Nelson, member of the House Judiciary Committee, in Minneapolis, Minnesota, Aug. 23, 1971.

action<sup>213</sup> is narrower than it is for the latter type.<sup>214</sup> Although the sections which control the scope of review under the APA are similar in some ways, the section governing "contested cases" permits the reviewing court to reverse or modify the agency determination if it is "unsupported by substantial evidence"<sup>215</sup> or "arbitrary or capricious."<sup>216</sup>

The provision in Section 116B.10 of the Rights Act for a different scope of judicial review than is contained in the APA is divergent from the trend in Minnesota towards providing a uniform scope of judicial review for appeals from agency decisions. This trend is especially clear in the area of contested cases. In the past, the scope of judicial review of an agency decision in a contested case depended, in part, upon the provision for judicial review, if any, contained in the statute which governed a particular agency.<sup>217</sup> However, the recent decision in *Minneapolis Van & Warehouse Co. v. St. Paul Terminal Warehouse Co.*<sup>218</sup> has apparently ended any distinction in the scope of judicial review based upon the statute under which review was obtained. In that case, the Minnesota Supreme Court was faced with the question of whether the scope of judicial review in a contested case arising from a decision of the Public Service Commission was controlled by the statute governing that agency<sup>219</sup> or by Section 15.0425 of the APA. The court held that the APA controlled, stating that "the enactment of Section 15.0425 of the Administrative Procedure Act in 1963 . . . was unmistakably intended by the legislature to make uniform the scope of judicial review of the decisions of all administrative fact-finding agencies . . . ."<sup>220</sup> This was reaffirmed soon after in another case involving the same agency.<sup>221</sup>

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213. See note 178 *supra*.

214. See note 180 *supra*.

215. *Id.*

216. *Id.*

217. Compare *Gibson v. Civil Service Board*, 285 Minn. 123, 171 N.W.2d 712 (1969), with *Dahlen Transport, Inc. v. Hahne*, 261 Minn. 218, 112 N.W.2d 630 (1961).

218. 288 Minn. 294, 180 N.W.2d 175 (1970).

219. The method of bringing appeals from decisions of the Public Service Commission is controlled by MINN. STAT. § 216.24 (1969). The scope of review for such appeals had previously been controlled by Section 216.25.

220. 288 Minn. at 297-98, 180 N.W.2d at 177.

221. *Quinn Distributing Co. v. Quast Transfer, Inc.*, 288 Minn. 442, 181 N.W.2d 696 (1970).



It seems clear from these recent decisions that the scope of judicial review in Minnesota of appeals from agency determinations in contested cases will, as a general rule, be controlled by Section 15.0425 of the APA. However, there are six reasons why this should not affect the scope of review set forth in Section 116B.10(3) of the Rights Act. First, the intent of the legislature in Subdivision (3) is clear; the standard is the preponderance of the evidence test. Second, the legislative history of that section shows that the APA was not to govern its operation.<sup>222</sup> Third, the Rights Act was enacted subsequent to the APA—and to the decision in *Minneapolis Van*—while the statute in *Minneapolis Van* was enacted prior to the APA. Fourth, the recent decisions providing for a uniform scope of review involved appeals from agency decisions; actions brought under Section 116B.10 are a combination of a civil action and judicial review of an agency order. Fifth, the purpose behind basing review of the agency's order on whether it is supported by a preponderance of the evidence was to provide a more rigorous review of such orders than would otherwise be available.<sup>223</sup> Finally, from a policy standpoint, there is some justification in having more rigorous review in Section 116B.10 proceedings than is normally the case because the agency is being forced to reconsider its own decision. In other cases, an agency is making an original determination and will probably be less committed to a certain predetermined position.

With respect to the scope of judicial review of appeals from rule-making proceedings, the law in Minnesota is less clear. The recent decisions in *Minneapolis Van* and its sequel, *Quinn Distributing*,<sup>224</sup> both involved contested cases not rule-making proceedings. However, even if the rationale in those cases is extended to rule-making proceedings,<sup>225</sup> the scope of review in the Rights Act should not be affected. If an action is brought under Section 116B.10 to challenge a rule or regulation, the standard set forth in Subdivision (3) should control the scope of review for the very same reasons it should do so in contested cases.

The degree to which the scope of review contained in Section 116B.10 will, in practice, differ from that provided by the APA also depends on whether a court, in reviewing the order

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222. See text accompanying note 36 *supra*.

223. See note 212 *supra*.

224. 288 Minn. 442, 181 N.W.2d 696 (1970).

225. See note 207 *supra*.

of an agency made pursuant to Subdivision (3) of that section, is restricted to the record made during the agency proceeding. In actions controlled by the APA such review would generally be confined to the record as submitted by the agency.<sup>226</sup> But, as previously discussed, the APA does not control Section 116B.10 of the Rights Act.<sup>227</sup> However, in spite of that, there are two reasons why the court should be so restricted under Section 116B.10. First, this was the law in Minnesota even before the adoption of the APA,<sup>228</sup> and second, the Rights Act can be read to imply such a result. In Section 116B.08(2), the Act states that following the agency proceeding provided for in Subdivision (1), "the court shall adjudicate the impact of the defendants' conduct" on the environment and "may order that additional evidence be taken to the extent necessary to protect the rights recognized in this act." There is no such provision in Section 116B.10 which can be interpreted to mean that the court is permitted to take additional evidence in reviewing the agency's order.

On the other hand, there are also reasons which support greater flexibility in this area. First, the APA itself is not totally rigid in its application where a court is hearing additional evidence when reviewing an agency decision.<sup>229</sup> Second, since an agency is being forced to reconsider its own decision, it may not always provide as full a hearing as might be desirable. A court could, however, always remand to solve this problem.

Finally, the attitude of the supreme court towards differentiating between various standards of evidence in the area of judicial review of agency decisions will also be a factor in determining the ultimate effect of the scope of review provided for

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226. MINN. STAT. § 15.0424(6) (1969).

227. See text accompanying note 36 *supra*.

228. *E.g.*, Minnesota State Federation of Labor v. Land O'Lakes Creameries, Inc., 248 Minn. 230, 238-39, 79 N.W.2d 366, 371 (1956); Nyberg v. R.N. Cardozo & Bros., Inc., 243 Minn. 361, 364, 67 N.W.2d 821, 823 (1954); Hamlin v. The Coolerator Co., 227 Minn. 437, 449-50, 35 N.W.2d 616, 622 (1949).

229. The APA provides that, in "contested cases,"

[t]he review shall be conducted by the court without a jury and shall be confined to the record, except that in cases of alleged irregularities in procedure before the agency, not shown in the record, testimony thereon may be taken in the court. The court shall, upon request, hear oral argument and receive written briefs . . .

MINN. STAT. § 15.0424(6) (1969).

in Section 116B.10. In the past, the court has generally avoided technical complexities and, irrespective of the verbal formulation, ended up with a "substantial evidence" test.<sup>230</sup> In view of this, it is unlikely that the Minnesota Supreme Court will purport to quantify, but rather will merely rank in order the "preponderance of the evidence" and the "substantial evidence" tests. The standard in Section 116B.10 will then serve as a directional signal which, in close cases, may provide for a different outcome than the "substantial evidence" test would.

In contrast to Section 116B.10 there is no explicit statement in Section 116B.09 concerning the scope of review. It does, however, provide that

[i]n any action for judicial review of any administrative, licensing, or other similar proceeding as described in subdivision 1 above, the court shall, in addition to any other duties imposed upon it by law, grant review of claims that the conduct caused, or is likely to cause pollution . . . of . . . natural resources located within the state, *and in granting such review it shall act in accordance with the provisions of this act and the administrative procedures* [sic] act.<sup>231</sup>

Although this provision is likely to be read as requiring that the APA govern the scope of judicial review in all cases controlled by Section 116B.09, an argument can be made that, in cases involving state agencies, Section 116B.10 should control the scope of review.<sup>232</sup>

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230. The scope of review, in most cases, is determined, or at least influenced, by the statute under which it was obtained. The scope of review in cases brought under different statutes is remarkably similar, partly because of the similarity of the statutes and partly because of the common sense approach the Minnesota Supreme Court has taken to the question. The usual scope of review was stated in *Bryan v. Community State Bank*, 285 Minn. 226, 234, 172 N.W.2d 771, 776 (1969), where the court ruled that

[a] court will not interfere with an administrative agency's conclusions unless it appears that the agency has violated a constitutional provision; has not kept within its jurisdiction; has proceeded on an erroneous theory of law; has acted arbitrarily or capriciously so that its determination represents its will and not its judgment; or is without evidence to support its conclusions.

This test is viewed by the court as the same as the scope of review provided under the "contested case" provisions of the APA. *Minneapolis Van & Warehouse Co. v. St. Paul Terminal Warehouse Co.*, 288 Minn. 294, 180 N.W.2d 175 (1970). For a lengthy compilation of the cases dealing with the scope of review, see *Dun. Dig.* (revised 3d ed.) § 397b (1967).

231. MINN. STAT. § 116B.09(3) (1971) (Emphasis added.)

232. There are also two other interpretations, both of which are considerably more expansive than the previously mentioned ones. First, it could be read as providing two scopes of judicial review;

This latter interpretation depends heavily on the initial phrase in Subdivision (1) of Section 116B.09, which states "Except as otherwise provided in section 10 of this act . . ." This implies that if there are any conflicts between Sections 116B.09 and 116B.10 the latter should control. The immediate question which arises, of course, is whether this phrase applies to all of Section 116B.09 or only to Subdivision (1). If it is restricted to only that one subdivision, the phrase in question would be largely superfluous since there is no conflict between Subdivision (1) of Section 116B.09 and the provisions in Section 116B.10. Assuming, then, that it does apply to the whole section, it could be argued that any conflict between the scope of review in these two sections should be resolved in favor of Section 116B.10. This can be reconciled with the language in Section 116B.09(3) (set out above) in the following way. Since Section 116B.09 itself says nothing about the procedure for judicial review, the APA would govern. But where the decisions of a state agency are involved, the scope of review in Section 116B.09 proceedings would conflict with the scope of review set forth in Section 116B.10. In such cases, Section 116B.10 would control the scope of judicial review.

But, in spite of the ambiguous language in Subdivisions (1) and (3) of Section 116B.09, the better interpretation is that the scope of review is controlled by the APA in all cases where intervention into administrative proceedings or judicial review thereof is effected by use of Section 116B.09. There is no specific provision in that section governing the scope of review while there is in Section 116B.10; by implication, there was no legislative intent to provide one in Section 116B.09. In addition, the legislative history shows that at one time Section 116B.10 contained references to the APA.<sup>233</sup> Such references were deleted from that section but not from Section 116B.09. Moreover, the interpretation by the Minnesota Supreme Court of the legislative intent behind Section 15.0425 of the APA<sup>234</sup> suggests that where there is room for debate, it will rule in favor of a uniform scope of judicial review under the APA.

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"polluters" would be governed by the APA standards, while "environmentalists" would be governed by the more favorable standard in Section 116B.10. Second, it could be contended that the scope of review for all parties in cases controlled by Section 116B.09 is governed by Section 116B.10.

233. See text accompanying note 36 *supra*.

234. See text accompanying notes 218-24 *supra*.

### 3. *Use of Sections 116B.09 and 116B.10 by Corporation X*

In the instant hypothetical situation, Corporation X could get judicial review under the APA but would be unable to make effective use of either Section 116B.09 or Section 116B.10. However, as is discussed in the following material, there are cases in which a similarly situated party could profitably utilize both of these sections.

#### a. Section 116B.09

In the instant hypothetical case, there are two reasons why Corporation X would be unable to make effective use of Section 116B.09. First, this section authorizes intervention into certain administrative proceedings and into judicial review thereof. In this case, the administrative proceedings are over and there is as yet no judicial review into which one could intervene. Second, intervention is only authorized

upon the filing of a verified pleading asserting that the proceeding or action for judicial review involves conduct that has caused or is likely to cause pollution, impairment, or destruction of the air, water, land or other natural resources located within the state.<sup>235</sup>

It is doubtful that Corporation X would want to file a verified pleading asserting that the conduct involved, the discharge of sulfur into the air, would cause pollution.<sup>236</sup>

Section 116B.09 could, however, be utilized in some cases by a party which some persons would label a polluter. The general situation in which this would occur is where the conduct at issue, in and of itself, is regarded by some persons as beneficial to the environment while others consider it detrimental. For example, there is divided opinion over selective cutting in parklands in Minnesota. Some conservationists believe that these areas should be allowed to exist without such artificial forestry cultivation methods. Other persons believe that, since selective cutting improves the quality of a forest by permitting new growth, it should be carried on even in parklands.<sup>237</sup> In

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235. MINN. STAT. § 116B.09(1) (1971).

236. However, it could be argued that the agency's conduct may cause pollution and that such conduct can be the subject of the verified pleading. For example, it could be argued that the process of reducing the sulfur content of discharges into the air might result in other pollutants being emitted.

237. This type of dispute is currently going on over selective cutting in the federally-owned Boundary Waters Canoe Area in northern Minnesota.

this type of situation, if an agency decided not to grant any permits for logging using selective cutting methods, a company in the logging business which had not originally applied for such a permit could intervene into judicial review of that decision under Section 116B.09.

b. Section 116B.10

Subdivision (1) of this section permits an action to be maintained "where the nature of the action is a challenge to an environmental quality standard," etc. This, by itself, could be interpreted as permitting Corporation X to challenge the new standard on sulfur content of discharges into the air. However, Subdivision (2) provides:

In any action maintained under this section the plaintiff shall have the burden of proving that the environmental quality standard . . . is inadequate to protect the air . . . within the state from pollution . . . .

And Subdivision (3) states that the action shall be dismissed if the plaintiff fails to establish a *prima facie* showing on the above matter.<sup>238</sup> In the instant hypothetical, Corporation X may be able to establish such a showing. But, for obvious reasons, the chances of it actually doing so are very remote.

There is at least one general situation in which an industrial concern like Corporation X could profitably use this section to actually challenge an agency ruling or decision.<sup>239</sup> The situation could arise where an agency of the state promulgates a new standard or issues a permit relating to environmental quality towards which some industrial company is favorable. At the same time, that company may believe that other persons in the state will challenge the standard or permit as being inadequate to protect the environment. Before the company invests in plant and equipment, it might well decide that some assurance is needed that the standard or permit will not be changed in the near future. It could challenge the standard under Section 116B.10 and proceed to deliberately lose the case. There is nothing in Section 116B.10 to prevent such an action, since "any partnership, corporation, [or] association . . . having shareholders, members, partners or employees residing within

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238. The use of "prima facie showing" is discussed in the text accompanying notes 100-102 *supra*.

239. In addition, such a party could intervene under Section 116B.10, Subdivision (4) in actions brought to challenge the adequacy of environmental quality standards or permits.

the state" can maintain an action under this section.<sup>240</sup> This would, however, conflict with one of the central purposes of the standing doctrine, which is to ensure there is, in fact, an actual dispute or controversy between the parties. There is no real dispute in this case since the company likes the new standard.<sup>241</sup> There are two solutions to this. It could be held that the purpose of Section 116B.10 was not to provide procedures for upholding a standard or permit relating to environmental quality, but rather to strike down or modify those which do not adequately protect the environment. Standing could, theoretically, be denied based on this argument. In any event, if there is some notice of an action like the one in question, other persons could intervene under the authority of Subdivision (4) and utilize Section 116B.10 to strike down the standard or decision just as if they had initiated the action.

#### 4. *Use of Sections 116B.09 and 116B.10 by the Conservation Group*

##### a. Section 116B.09

In the instant hypothetical, the administrative proceeding already having been completed, there would be no way to intervene into an administrative proceeding. At an earlier point in time the conservation group could have done so upon filing the required verified pleading.<sup>242</sup> In such a case, Section 116B.09(2) would be of critical importance. That provision provides:

In any such administrative, licensing, or other similar proceedings, the agency shall consider the alleged impairment . . . of . . . natural resources . . . and no conduct shall be authorized or approved which does, or is likely to have such effect so long as there is a feasible and prudent alternative consistent with the reasonable requirements of the public health, safety, and welfare and the state's paramount concern for the protection of its . . . natural resources from pollution, impairment, or destruction. Economic considerations alone shall not justify such conduct.

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240. MINN. STAT. § 116B.10(1) (1971).

241. Cases could, however, arise where an industrial company may legitimately want to challenge the adequacy of a new standard. For instance, it may have already installed pollution control equipment which permits it to meet a stricter standard. Competitors would be in a possibly advantageous position if a weaker standard were adopted. They not only could avoid the cost of additional pollution control equipment, but also the higher operating costs that many times result from the use of such equipment.

242. MINN. STAT. § 116B.09(1) (1971).

This provision is very similar to the affirmative defense in the second paragraph of Section 116B.04.<sup>243</sup> There is, however, one important difference. Under Section 116B.09, an agency could legitimately authorize conduct which is not "consistent with the reasonable requirements of public health," etc., as long as it was established that there was no "feasible and prudent alternative." In contrast, if a defendant in a civil action maintained under the authority of Section 116B.03 wants to utilize the affirmative defense in Section 116B.04, it must be established that there is no "feasible and prudent alternative" *and* that the conduct at issue is "reasonably required for the promotion of the public health," etc. In Section 116B.09, only one of the factors need be established before an agency can authorize the conduct at issue to continue, while both factors must be established in a Section 116B.03 action in order to excuse conduct which is causing pollution. While this difference was not intentional,<sup>244</sup> there is some logic in it. In actions under Section 116B.03, if the defendant establishes both the factors set out above, a complete defense is established and the conduct can continue. In actions governed by Section 116B.09, only one factor has to be established but the agency then has the discretion to authorize it; there is no requirement that it do so. An agency could require both of the factors to be established before it would authorize the conduct at issue. This does, however, give agencies considerably more discretion than Section 116B.09 was probably intended to give them.

b. Section 116B.10

Assuming this section is applicable to cases in which there is no statutory appeal period,<sup>245</sup> the conservation group must first establish a *prima facie* showing<sup>246</sup> that the rule in question is not adequate to protect the environment.<sup>247</sup> If this is not satisfied, the court must dismiss.<sup>248</sup> If it is satisfied, the court must "remit the parties to the state agency or instrumentality that promulgated" the rule<sup>249</sup>—here the PCA. The agency

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243. See Part III B2(c) *supra*.

244. Interview with Richard N. Flint, chairman of the Environmental Law Subcommittee of the Minnesota Bar Association, in Minneapolis, Minnesota, Sept. 9, 1971.

245. See text accompanying notes 191-96 *supra*.

246. MINN. STAT. § 116B.10(2), (3) (1971).

247. *Id.*

248. *Id.* at (3).

249. *Id.*



is then required to "institute the appropriate administrative proceedings to consider and make findings and an order" regarding those matters upon which the plaintiff's *prima facie* case is based.<sup>250</sup> It is also specified that the court retains jurisdiction of the case "for purposes of judicial review to determine whether the order of the agency is supported by the preponderance of the evidence."<sup>251</sup>

Subdivision (3) permits the court to grant temporary relief to prevent irreparable injury if the case is remitted,<sup>252</sup> but there is no provision for the posting of security. This is contrary to Section 116B.07, which generally controls relief in civil actions maintained under Section 116B.03, but is identical with the provision in Section 116B.08(1), which controls remittance in such actions. It could be argued from this that no security is required before one can obtain temporary relief in actions controlled by Section 116B.10. Some additional support for this contention is that Section 116B.10(3) provides for the assessment of "such costs and disbursements as the court deems appropriate" if the plaintiff fails to establish a *prima facie* showing in actions brought under the authority of Section 116B.10. It could be argued that the court was to have discretion in assessing costs in the area of security for damages incurred because of the imposition of a temporary injunction. However, the above provision was probably intended to be a guard against harassment of state agencies. In any event, Minnesota Rule of Civil Procedure 65.03 requires that some security be posted, leaving only the amount to the court's discretion. Therefore, as was the case under Section 116B.08(1),<sup>253</sup> some security will have to be posted in order to obtain a temporary injunction.

## V. CONCLUSION

In the past, only legislative or administrative action had the potential to effectively protect the environment. Recent years, however, have seen the rise of increased sentiment that this potential has not been fulfilled. Legislation such as the Minnesota Environmental Rights Act is a major response to

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250. *Id.*

251. *Id.*

252. There is no indication of what the permissible subject of this temporary relief may be. However, it appears that in a case brought to challenge the adequacy of permits issued by a state agency, the court could temporarily enjoin the use of such permits.

253. See text accompanying notes 133-34 *supra*.

this problem. It provides a third alternative for protection of the environment. By giving courts more power to deal with environmental matters, it not only allows citizen initiative to play a part in preservation of our natural resources but may also serve as a catalyst for increased administrative response to such problems.

However, this type of legislation is based on the premise that the courts will be more receptive to increased protection of natural resources than are administrative agencies set up to pursue that goal. To the extent this is an accurate evaluation, the Act will provide for increased protection of the environment.

## APPENDIX

*An act relating to environmental protection; providing a civil action for protection of the environment from pollution, impairment, or destruction; providing permanent and temporary relief and remedies.*

Section 1. [116B.01] PURPOSE. The legislature finds and declares that each person is entitled by right to the protection, preservation, and enhancement of air, water, land, and other natural resources located within the state and that each person has the responsibility to contribute to the protection, preservation, and enhancement thereof. The legislature further declares its policy to create and maintain within the state conditions under which man and nature can exist in productive harmony in order that present and future generations may enjoy clean air and water, productive land, and other natural resources with which this state has been endowed. Accordingly, it is in the public interest to provide an adequate civil remedy to protect air, water, land and other natural resources located within the state from pollution, impairment, or destruction.

Sec. 2. [116B.02] DEFINITIONS. Subdivision 1. For purposes of this act, the following terms have the meanings given them in this section.

Subd. 2. "Person" means any natural person, any state, municipality or other governmental or political subdivision or other public agency or instrumentality, any public or private corporation, any partnership, firm, association, or other organization, any receiver, trustee, assignee, agent, or other legal representative of any of the foregoing, and any other entity, except a family farm, a family farm corporation or a bona fide farmer corporation.

Subd. 3. "Nonresident individual" means any natural person, or his personal representative, who is not domiciled or residing in the state when suit is commenced.

Subd. 4. Natural resources shall include, but not be limited to, all mineral, animal, botanical, air, water, land, timber, soil, quietude, recreational and historical resources. Scenic and esthetic resources shall also be considered natural resources when owned by any governmental unit or agency.

Subd. 5. "Pollution, impairment or destruction" is any conduct by any person which violates, or is likely to violate, any environmental quality standard, limitation, regulation, rule, order, license, stipulation agreement, or permit of the state or any instrumentality, agency, or political subdivision thereof which was issued prior to the date the alleged violation occurred or is likely to occur or any conduct which materially adversely affects or is likely to materially adversely affect the environment; provided that "pollution, impairment or destruction" shall not include conduct which violates, or is likely to violate, any such standard, limitation, regulation, rules, order, license, stipulation agreement or permit solely because of the introduction of an odor into the air.

Subd. 6. "Family farm" shall mean any farm owned by a natural person, or one or more natural persons all of whom are related within the third degree of kindred according to the civil law, at least one of whose owners resides on or actively operates said farm.

Subd. 7. "Family farm corporation" means a corporation founded for the purpose of farming and owning agricultural land, in which the majority of the voting stock is held by, and the majority of the stockholders are, members of a family related to each other within the third

degree of kindred according to the rules of the civil law, and at least one of whose stockholders is a person residing on or actively operating the farm, and none of whose stockholders are corporations.

Subd. 8. "Bona fide farmer corporation" means an association of two or more natural persons, one of which, if two persons are so associated, or the majority of which, if more than two persons are so associated, reside on, or are actively operating a farm.

Sec. 3. [116B.03] CIVIL ACTIONS. Subdivision 1. Any person residing within the state; the attorney general; any political subdivision of the state; any instrumentality or agency of the state or of a political subdivision thereof; or any partnership, corporation, association, organization, or other entity having shareholders, members, partners or employees residing within the state may maintain a civil action in the district court for declaratory or equitable relief in the name of the state of Minnesota against any person, for the protection of the air, water, land, or other natural resources located within the state, whether publicly or privately owned, from pollution, impairment, or destruction; provided, however, that no action shall be allowable hereunder for acts taken by a person on land leased or owned by said person pursuant to a permit or license issued by the owner of the land to said person which do not and cannot reasonably be expected to pollute, impair, or destroy any other air, water, land, or other natural resources located within the state; provided further that no action shall be allowable under this section for conduct taken by a person pursuant to any environmental quality standard, limitation, regulation, rule, order, license, stipulation agreement or permit issued by the pollution control agency, department of natural resources, department of health or department of agriculture.

Subd. 2. Within seven days after commencing such action, the plaintiff shall cause a copy of the summons and complaint to be served upon the attorney general and the pollution control agency. Within 21 days after commencing such action, the plaintiff shall cause written notice thereof to be published in a legal newspaper in the county in which suit is commenced, specifying the names of the parties, the designation of the court in which the suit was commenced, the date of filing, the act or acts complained of, and the declaratory or equitable relief requested. The court may order such additional notice to interested persons as it may deem just and equitable.

Subd. 3. In any action maintained under this section, the attorney general may intervene as a matter of right and may appoint outside counsel where as a result of such intervention he may represent conflicting or adverse interests. Other interested parties may be permitted to intervene on such terms as the court may deem just and equitable in order to effectuate the purposes and policies set forth in section 1.

Subd. 4. Except as provided in Minnesota Statutes, Sections 15.0416, 15.0424, 115.05, 116.07 and 542.03, any action maintained under this section may be brought in any county in which one or more of the defendants reside when the action is begun, or in which the cause of action or some part thereof arose, or in which the conduct which has or is likely to cause such pollution, impairment, or destruction occurred. If none of the defendants shall reside or be found in the state, the action may be begun and tried in any county which the plaintiff shall designate. A corporation, other than railroad companies, street railway companies, and street railroad companies whether the motive power is steam, electricity, or other power used by these corporations or companies, also telephone companies, telegraph companies, and all other public service corporations, shall be considered as re-

siding in any county wherein it has an office, resident agency or, business place. The above enumerated public service corporations shall be considered as residing in any county wherein the cause of action shall arise or in which the conduct which has or is likely to cause pollution, impairment or destruction occurred and wherein any part of its lines of railway, railroad, street railway, street railroad, without regard to the motive power of the railroad, street railway, or street railroad, telegraph or telephone lines or any other public service corporation shall extend, without regard to whether the corporation or company has an office, agent, or business place in the county or not.

Subd. 5. Where any action maintained under this section results in a judgment that a defendant has not violated an environmental quality standard, limitation, regulation, rule, order, license, stipulation agreement, or permit promulgated or issued by the pollution control agency, department of natural resources, department of health, or department of agriculture, the judgment shall not in any way estop the agency from relitigating any or all of the same issues with the same or other defendant unless in the prior action the agency was, either initially or by intervention a party. Where the action results in a judgment that the defendant has violated an environmental quality standard, limitation, regulation, rule, order, license, stipulation agreement, or permit promulgated or issued by the pollution control agency, department of natural resources, department of health or department of agriculture the judgment shall be *res judicata* in favor of the agency in any action the agency might bring against the same defendant.

Sec. 4. [116B.04] BURDEN OF PROOF. In any action maintained under section 3, where the subject of the action is conduct governed by any environmental quality standard, limitation, regulation, rule, order, license, stipulation agreement, or permit promulgated or issued by the pollution control agency, department of natural resources, department of health, or department of agriculture, whenever the plaintiff shall have made a *prima facie* showing that the conduct of the defendant violates or is likely to violate said environmental quality standard, limitation, regulation, rule, order, license, stipulation agreement, or permit, the defendant may rebut the *prima facie* showing by the submission of evidence to the contrary; provided, however, that where the environmental quality standards, limitations, regulations, rules, orders, licenses, stipulation agreements, or permits of two or more of the aforementioned agencies are inconsistent, the most stringent shall control.

In any other action maintained under section 3, whenever the plaintiff shall have made a *prima facie* showing that the conduct of the defendant has, or is likely to cause the pollution, impairment, or destruction of the air, water, land or other natural resources located within the state, the defendant may rebut the *prima facie* showing by the submission of evidence to the contrary. The defendant may also show, by way of an affirmative defense, that there is no feasible and prudent alternative and the conduct at issue is consistent with and reasonably required for promotion of the public health, safety, and welfare in light of the state's paramount concern for the protection of its air, water, land and other natural resources from pollution, impairment, or destruction. Economic considerations alone shall not constitute a defense hereunder.

Sec. 5. [116B.05] APPOINTMENT OF REFEREE. The court may appoint a referee, who shall be a disinterested person to take testimony and make a report to the court in any such action.

Sec. 6. [116B.06] BOND. If the court has reasonable grounds to doubt the plaintiff's ability to pay any judgment for costs and dis-

bursements which might be rendered against him pursuant to Minnesota Statutes, Chapter 549, in an action brought under section 3, the court may order the plaintiff to post a bond or cash not to exceed \$500 to serve as security for such judgment.

Sec. 7. [116B.07] RELIEF. The court may grant declaratory relief, temporary and permanent equitable relief, or may impose such conditions upon a party as are necessary or appropriate to protect the air, water, land or other natural resources located within the state from pollution, impairment, or destruction. When the court grants temporary equitable relief, it may require the plaintiff to post a bond sufficient to indemnify the defendant for damages suffered because of the temporary relief, if permanent relief is not granted.

Sec. 8. [116B.08] REMITTITUR. Subdivision 1. If administrative licensing, or other similar proceedings are required to determine the legality of the defendants' conduct, the court shall remit the parties to such proceedings. If administrative, licensing, or other similar proceedings are available to determine the legality of the defendants' conduct, the court may remit the parties to such proceedings. In so remitting the parties the court may grant temporary equitable relief where appropriate to prevent irreparable injury to the air, water, land or other natural resources located within the state. In so remitting the parties the court shall retain jurisdiction of the cause pending completion thereof.

Subd. 2. Upon completion of such proceedings, the court shall adjudicate the impact of the defendants' conduct, program, or product on the air, water, land, or other natural resources located within the state in accordance with the preceding sections 2 through 7. In such adjudication, the court may order that additional evidence be taken to the extent necessary to protect the rights recognized in this act.

Subd. 3. Where, as to any such administrative, licensing, or other similar proceedings referred to above, judicial review thereof is available, notwithstanding any other provisions of law to the contrary, the court originally taking jurisdiction shall maintain jurisdiction for purposes of judicial review.

Subd. 4. Nothing in this section shall be applicable to any action maintained under section 10 of this act or to any appropriate administrative proceeding required thereunder.

Sec. 9. [116B.09] INTERVENTION; JUDICIAL REVIEW. Subdivision 1. Except as otherwise provided in section 10 of this act, in any administrative, licensing, or other similar proceeding, and in any action for judicial review thereof which is made available by law, any natural person residing within the state, the attorney general, any political subdivision of the state, any instrumentality or agency of the state or of a political subdivision thereof, or any partnership, corporation, association, organization or other legal entity having shareholders, members, partners, or employees residing within the state shall be permitted to intervene as a party upon the filing of a verified pleading asserting that the proceeding or action for judicial review involves conduct that has caused or is likely to cause pollution, impairment, or destruction of the air, water, land or other natural resources located within the state.

Subd. 2. In any such administrative, licensing, or other similar proceedings, the agency shall consider the alleged impairment, pollution, or destruction of the air, water, land, or other natural resources located within the state and no conduct shall be authorized or approved which does, or is likely to have such effect so long as there is a feasible and prudent alternative consistent with the reasonable requirements of the public health, safety, and welfare and the state's paramount con-

cern for the protection of its air, water, land, and other natural resources from pollution, impairment, or destruction. Economic considerations alone shall not justify such conduct.

Subd. 3. In any action for judicial review of any administrative, licensing, or other similar proceeding as described in subdivision 1 above, the court shall, in addition to any other duties imposed upon it by law, grant review of claims that the conduct caused, or is likely to cause pollution, impairment, or destruction of the air, water, land, or other natural resources located within the state, and in granting such review it shall act in accordance with the provisions of this act and the administrative procedures act.

Sec. 10. [116B.10] REVIEWAL OF STATE ACTIONS. Subdivision 1. CIVIL ACTIONS. As hereinafter provided in this section, any natural person residing within the state; the attorney general; any political subdivision of the state; any instrumentality or agency of the state or of a political subdivision thereof; or any partnership, corporation, association, organization, or other legal entity having shareholders, members, partners or employees residing within the state may maintain a civil action in the district court for declaratory or equitable relief against the state or any agency or instrumentality thereof where the nature of the action is a challenge to an environmental quality standard, limitation, regulation, rule, order, license, stipulation agreement, or permit promulgated or issued by the state or any agency or instrumentality thereof for which the applicable statutory appeal period has elapsed.

Subd. 2. BURDEN OF PROOF. In any action maintained under this section the plaintiff shall have the burden of proving that the environmental quality standard, limitation, regulation, rule, order, license, stipulation agreement, or permit is inadequate to protect the air, water, land, or other natural resources located within the state from pollution, impairment, or destruction. The plaintiff shall have the burden of proving the existence of material evidence showing said inadequacy of said environmental quality standard, limitation, regulation, rule, order, license, stipulation agreement, or permit.

Subd. 3. REMITTITUR; JUDICIAL REVIEW. In any action maintained under this section the district court, upon a prima facie showing by the plaintiff of those matters specified in subdivision 2, shall remit the parties to the state agency or instrumentality that promulgated the environmental quality standard, limitation, regulation, rule, order, license, stipulation agreement, or permit which is the subject of the action, requiring said agency or instrumentality to institute the appropriate administrative proceedings to consider and make findings and an order on those matters specified in subdivision 2. In so remitting the parties, the court may grant temporary equitable relief where appropriate to prevent irreparable injury to the air, water, land, or other natural resources located within the state. In so remitting the parties, the court shall retain jurisdiction for purposes of judicial review to determine whether the order of the agency is supported by the preponderance of the evidence. If plaintiff fails to establish said prima facie showing, the court shall dismiss the action and award such costs and disbursements as the court deems appropriate.

Subd. 4. INTERVENTION. In any action maintained under this section, any natural person residing within the state; the attorney general; any political subdivision of the state; any instrumentality or agency of the state or of a political subdivision thereof; or any partnership, corporation, association, organization or other legal entity having shareholders, members, partners or employees residing within the state shall be permitted to intervene as a party, provided that said person makes timely

application to the district court prior to the court's remittance of the action as specified in subdivision 3.

Subd. 5. **VENUE.** Any action maintained under this section shall be brought in the county in which is located the principal office of the state agency or instrumentality that promulgated the rule, regulation, standard, order or permit which is the subject of the action.

Sec. 11. [116B.11] **JURISDICTION; SERVING PROCESS.** Subdivision 1. As to any cause of action arising under sections 1 to 14 hereof, the district court may exercise personal jurisdiction over any foreign corporation or any nonresident individual, or his personal representative, in the same manner as if it were a domestic corporation or he were a resident of this state. This section applies if, in person or through an agent, the foreign corporation or nonresident individual:

(a) Commits or threatens to commit any act in the state which would impair, pollute or destroy the air, water, land, or other natural resources located within the state, or

(b) Commits or threatens to commit any act outside the state which would impair, pollute or destroy the air, water, land or other natural resources located within the state, or

(c) Engages in any other of the activities specified in section 543.19 of the Minnesota statutes.

Subd. 2. The service of process on any person who is subject to the jurisdiction of the courts of this state, as provided in this section, may be made by personally serving the summons upon the defendant outside this state with the same effect as though the summons had been personally served within this state.

Subd. 3. Only causes of action arising from acts enumerated or referenced in subdivision 1 may be asserted against a defendant in an action in which jurisdiction over him is based upon this section.

Subd. 4. Nothing contained in this section shall limit or affect the right to serve any process in any other manner now or hereafter provided by law or the Minnesota Rules of Civil Procedure.

Sec. 12. [116B.12] **RIGHTS AND REMEDIES NONEXCLUSIVE.** No existing civil or criminal remedy for any wrongful action shall be excluded or impaired by this act. The rights and remedies provided herein shall be in addition to any administrative, regulatory, statutory or common law rights and remedies now or hereafter available.

Sec. 13. [116B.13] **SEVERABILITY.** If any section, subdivision, sentence, or clause of this act shall be adjudged unconstitutional, such adjudication shall not affect the validity of the act as a whole or of any section, subdivision, sentence, or clause thereof not adjudged unconstitutional.

Sec. 14. [116B.14] **CITATION.** This act may be cited as the "Minnesota Environmental Rights Act".

Approved June 7, 1971.